No. 14-939

IN THE

Supreme Court of the United States

STANLEY TAYLOR; RAPHAEL WILLIAMS,

Petitioners,

v.

KAREN BARKES; ALEXANDRA BARKES; BRITTANY BARKES,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Third Circuit erred in holding that 42 U.S.C. § 1983 authorizes the imposition of supervisory liability on state officials for a subordinate's alleged constitutional violation.

2. Whether the Third Circuit erred in holding that there is a clearly established right under the Eighth Amendment to the "proper implementation of adequate suicide prevention protocols."

PARTIES TO THE PROCEEDINGS

Petitioners, Stanley Taylor and Raphael Williams, were the defendants-appellants below.

Respondents, Karen Barkes, personally and as administratrix of the estate of Christopher Barkes, Alexandra Barkes, and Brittany Barkes, were the plaintiffs-appellees below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, Stanley Taylor and Raphael Williams, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at *Barkes* v. *First Correctional Medical, Inc.*, 766 F.3d 307 (3d Cir. 2014), and is reproduced at Petition Appendix (Pet. App.) 1a-76a. The district court's unpublished opinions are available at 2008 WL 523216 (D. Del. Feb. 27, 2008), and 2012 WL 2914915 (D. Del. July 17, 2012), and are reproduced at Pet. App. 104a-121a and 77a-103a.

JURISDICTION

The court of appeals entered its judgment on September 5, 2014, and denied a petition for rehearing en banc by order dated October 3, 2014. Pet. App. 1a, 122a-23a. On December 16, 2014, Justice Alito extended the time within which to file a petition for a writ of certiorari to and including February 2, 2015. This Court has jurisdiction over this timely filed petition pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the ju-

> risdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

The Eighth Amendment to the United States Constitution, made applicable to the states through the Fourteenth Amendment, provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

INTRODUCTION

In the decision below, the court of appeals held that "two of the most senior executives in the Delaware prison system must stand trial" on a 42 U.S.C. § 1983 claim that they violated an inmate's constitutional right not to be subjected to "cruel and unusual punishment." Pet. App. 48a (Hardiman, J., dissenting). The claimed constitutional violation was a prison medical provider's use of a 1997 version of suicide screening protocols, rather than a 2004 version, and the administration of the screening by a licensed practical nurse rather than a mental health professional. *Id.* at 44a. These claims, the court held, stated a violation of the prisoner's "clearly established" right under the Eighth Amendment to the "proper

implementation of adequate suicide prevention protocols," even though the prisoner denied being suicidal and exhibited no signs of mental or emotional distress. *Id.* at 5a, 42a. And the state officials were alleged to be liable for that error based on their "failure to supervise" the medical provider, although neither official had knowledge of the prisoner or involvement with any decisions as to his medical care, and neither directly supervised the medical provider. *Id.* at 44a, 51a-52a.

This decision conflicts with decisions of this Court and other courts of appeals on two important legal questions. *First*, the Third Circuit's decision—that these high-ranking state officials could be liable under section 1983 for failure to supervise the medical provider—conflicts with this Court's holding in *Ashcroft* v. *Iqbal*, 556 U.S. 662 (2009), that "'supervisory liability' is a misnomer" in section 1983 suits, and that "each Government official, his or her title notwithstanding, is only liable for his or her own misconduct." *Id.* at 677. Because the officials were not involved with the inmate's treatment (or even with supervising the medical provider) and the plaintiffs did not challenge the State's policies, these officials could only be liable under a theory of *respondeat superior*—a theory this Court has foreclosed in this setting. As the dissent noted, the complaint "targeted" these officials because they "'presided over a system.'" Pet. App. 66a, 72a (quoting Complaint). This is "a classic case of holding supervisors vicariously liable, a practice the Supreme Court proscribed in *Ashcroft v. Iqbal*." *Id.* at 48a (dissent).

The Fifth, Seventh, Eighth, and Tenth Circuits have all held that supervisors cannot be held liable under section 1983 if they were not personally involved in the constitutional violation or in imple-

menting an unconstitutional policy. See *Gates* v. *Tex. Dep't of Protective & Regulatory Servs.*, 537 F.3d 404, 435 (5th Cir. 2008); *Vance* v. *Rumsfeld*, 701 F.3d 193, 203-05 (7th Cir. 2012) (en banc), *cert. denied*, 133 S. Ct. 2796 (2013); *Nelson* v. *Corr. Med. Servs.*, 583 F.3d 522, 535-36 (8th Cir. 2009) (en banc); *Porro* v. *Barnes*, 624 F.3d 1322, 1326-27 (10th Cir. 2010). Like the Third Circuit, however, the Ninth Circuit has held that supervisors may be liable for failure to prevent subordinates' violations. See *Starr* v. *Baca*, 652 F.3d 1202, 1205-07 (9th Cir. 2011). The decision below "invites plaintiffs to sue senior government officials whenever prison guards use force against an inmate or police officers mistreat a suspect." Pet. App. 69a (dissent). The Court should grant the petition to resolve this conflict and ensure that high-ranking state government officials in the Third and Ninth Circuits are not exposed to the burdens of litigation under section 1983 when only a subordinate is alleged to have violated the Constitution.

Second, the Third Circuit's holding that there is a clearly established constitutional right to the "proper implementation of adequate suicide prevention protocols," Pet. App. 42a, conflicts with this Court's holdings that the Eighth Amendment does not constitutionalize medical malpractice in prisons or require the adoption of whatever courts determine to be the "best practices" in the medical treatment of inmates. This Court has made clear that inadequate medical care constitutes "cruel and unusual punishment" only when prison officials are deliberately indifferent to a prisoner's known medical needs. See, *e.g.*, *Farmer* v. *Brennan*, 511 U.S. 825, 838 (1994). Accordingly, multiple circuits have held that the Eighth Amendment does not require prisons to examine every inmate for potential suicidal tendencies. See, *e.g.*, *Belcher* v. *Ol-*

iver, 898 F.2d 32, 34-35 (4th Cir. 1990); *Whitt* v. *Stephens Cnty.*, 529 F.3d 278, 284 (5th Cir. 2008); *Tittle* v. *Jefferson Cnty. Comm'n*, 10 F.3d 1535, 1539-40 (11th Cir. 1994) (en banc).

Here, the Third Circuit did not stop at holding that a prisoner has a constitutional right to be examined for possible suicidal tendencies; it further held that all inmates have a right to "proper implementation of adequate suicide prevention protocols," which can be violated if a prison deviates from the most recent recommended screening practices. Pet. App. 42a. As the dissent here explained, this holding is "inconsistent with the weight of authority" from other circuits. *Id.* at 74a. This Court should grant the petition to bring the Third Circuit back in line with *Farmer* and its progeny, and with the decisions of the other courts of appeals.

STATEMENT OF THE CASE

1. Christopher Barkes "was a troubled man with a long history of mental health and substance abuse problems." Pet. App. 2a. He was arrested in 2004 for violating his probation, and taken to the Howard R. Young Correctional Institution ("HRYCI") in Wilmington, Delaware. *Id.* at 4a. A private contractor named First Correctional Medical ("FCM") provided the prison's medical services. *Id.* As part of Barkes's intake at the prison, a licensed practical nurse ("LPN") conducted a standard medical screening, which included a mental health screening designed, among other purposes, to determine whether prisoners are suicidal. *Id.*

The suicide screening form that First Correctional Medical used was modeled on a form created by the National Commission for Correctional Health Care ("NCCHC") in 1997. Pet. App. 7a-8a. Although the

Commission had released an updated protocol in 2003, First Correctional Medical continued using the 1997 form. *Id.* at 8a. If the inmate checked at least eight out of 17 risk factors on the 1997 form, or if certain serious risk factors were present, then the nurse would notify a physician and initiate suicide prevention measures. *Id.* at 5a.

During Barkes's screening, he "did not self-report feelings of suicidal ideation, nor did he exhibit any outward signs of suicidality." Pet. App. 47a. Barkes also did not display an "altered mental status" or "abnormal conduct." *Id.* at 5a. Barkes disclosed that he "had attempted suicide in 2003," but did not disclose three other previous suicide attempts, one in 1997 and two in 2004. *Id.* at 4a-5a. He also disclosed "that he had a psychiatric history," but incorrectly "denied having a history of drug abuse." *Id.* at 5a. Because Barkes checked only two of the 17 risk factors—"his psychiatric history and the 2003 suicide attempt"—the nurse "referred Barkes to mental health services on a 'routine' urgency level," and did not place him on suicide watch. *Id.*

Later that night, in a phone call to his wife, Barkes stated that he "can't live this way anymore" and that he was "going to kill himself." Pet. App. 5a. However, Barkes's wife did not notify anyone at the prison that Barkes was suicidal. And Barkes did not either. *Id.* The next morning, guards observed Barkes "at 10:45, 10:50, and 11:00 a.m., and none recalled anything unusual about him or any indication that he was suicidal." *Id.* at 6a. At 11:35 a.m., a guard discovered that Barkes had hanged himself in his cell. *Id.*

2. In 2006, Barkes's widow, individually and as administratrix of his estate, and his children sued, among others, Stanley Taylor, the Commissioner of

the Delaware Department of Correction, and Raphael Williams, the Warden of the prison, alleging that they "had violated the Eighth Amendment through their deliberate indifference to Christopher Barkes' serious medical needs, and by failing to train and/or maintaining wrongful customs, practices, and policies." Pet. App. 105a.

"The parties agree[d] that neither executive had any personal knowledge of Barkes before his death." Pet. App. 52a (dissent), 117a. Further, Warden Williams "was outside of the chain of supervision over FCM"; the medical staff were contractors for the Department of Corrections, not employees of the prison, and they did not report to the Warden or his subordinates. *Id.* at 51a-52a. The parties also agreed that Commissioner Taylor did not directly supervise FCM. Instead, Joyce Talley, the head of the Department of Corrections' Bureau of Management Services, supervised FCM. *Id.* Commissioner Taylor was Talley's supervisor, but had no direct involvement with FCM; "Delaware law empowered him to designate someone to administer the state's medical services contract, and he appointed Talley to discharge that duty." *Id.* at 52a. Plaintiffs did not name Talley as a defendant in the lawsuit. *Id.* at 51a-52a.

In 2008, the district court granted summary judgment in favor of the defendants. It held that Commissioner Taylor and Warden Williams were entitled to qualified immunity on the claim that they were deliberately indifferent to Barkes's medical needs because "[i]t is undisputed by Plaintiffs that Defendants Taylor and Williams had no personal involvement in the events surrounding Mr. Barkes's suicide, and there is no evidence in the record to suggest that the DOC Commissioner or the HRYCI Warden had any interaction with Barkes, or knowledge of his condi-

tion." Pet. App. 117a. It further held that they were entitled to qualified immunity on the claim that they maintained unconstitutional policies or practices with regard to suicide prevention. While plaintiffs argued that FCM should have used a different intake screening protocol, and should have had a registered nurse rather than a licensed practical nurse administer the protocol, plaintiffs "do not discuss how different intake screening or different medical personnel would have resulted in Mr. Barkes's identification as suicidal, and prevented his suicide." *Id.* at 119a.

The court granted plaintiffs leave "to file a Third Amended Complaint limited to a claim of failure to supervise." Pet. App. 81a. Accordingly, in 2010, plaintiffs filed an amended complaint "solely seeking relief as to Count V, which alleges that Defendants violated Barkes's civil rights *by failing to adequately supervise* the medical treatment provided at HRYCI by FCM." *Id.* (emphasis supplied). Plaintiffs also sought reinstatement of their claim that Commissioner Taylor and Warden Williams were deliberately indifferent to Barkes's medical needs. *Id.* at 81a-82a.

The court denied reconsideration, again holding that "a reasonable factfinder could not determine that Defendants were deliberately indifferent to the risk of suicide." Pet. App. 87a. The district court then held that Commissioner Taylor and Warden Williams were not entitled to qualified immunity on the "failure to supervise" claim. The court reasoned that "Barkes had a clearly established constitutional right to adequate medical care," and "[i]f Plaintiffs can demonstrate that Defendants failed to supervise and/or monitor FCM in such a manner as to subsequently give rise to Barkes' suicide," they would establish a violation of that right. *Id.* at 94a.

The court rejected defendants' argument "that Plaintiffs' claim of failure to supervise/monitor a medical provider is not a cognizable claim under § 1983." Pet. App. 99a. The court again recognized that "it is undisputed that neither Taylor nor Williams had any personal involvement with Barkes' suicide," *id.* at 101a; rather, "Plaintiffs assert that Defendants presided over a prisoner medical screening process—carried out by FCM—which Defendants knew was deficient, yet they failed to act to prevent the risk of prisoner suicide," *id.* at 96a. This claim was cognizable, the court held, because "Plaintiffs seek to hold Defendants Taylor and Williams liable for their *individual* actions (in failing to supervise) rather than for the actions of their subordinates." *Id.* at 101a.

3. The Third Circuit affirmed the district court's decision that the defendants were not entitled to qualified immunity on plaintiffs' "failure to supervise" claim. It found that "it is necessary first to consider whether and to what extent our precedent on supervisory liability in the Eighth Amendment context was altered by the Supreme Court's decision in *Ashcroft v. Iqbal*." Pet. App. 14a. The court remarked that *Iqbal*'s holding that "'supervisory liability' is a misnomer" under section 1983 "has bedeviled the Courts of Appeals to have considered it, producing varied interpretations of its effect on supervisory liability." *Id.* at 18a-19a. It then held that "[w]e do not read *Iqbal* to have abolished supervisory liability in its entirety." *Id.* at 22a. Instead, the Third Circuit "agree[d] with those courts that have held that, under *Iqbal*, the level of intent necessary to establish supervisory liability will vary with the underlying constitutional tort alleged." *Id.* The court then concluded that *Iqbal* had no impact upon the Third Circuit's previous test for supervisory liability under section

1983 where the plaintiff claims that "a state official, by virtue of his or her own deliberate indifference to known deficiencies in a government policy or procedure, has allowed to develop an environment in which there is an unreasonable risk that a constitutional injury will occur." *Id.* (emphases omitted).

Applying this standard, the Third Circuit held that Commissioner Taylor and Warden Williams were not entitled to qualified immunity. It held that the constitutional "right Appellees assert, properly defined, is this: an incarcerated person's right to the proper implementation of adequate suicide prevention protocols." Pet. App. 38a. This right, the court held, is "clearly established in our case law," because prior cases held that the Eighth Amendment "obliges the States to provide adequate medical care," and "vulnerability to suicide is a serious medical need." *Id.* at 38a-39a. There was a genuine dispute of fact as to whether defendants violated this right, the court held, because there was evidence that "FCM's suicide prevention screening practices were not in compliance with NCCHC standards, as required by their contract with the DOC." *Id.* at 44a-45a.

Specifically, plaintiffs argued that, under the NCCHC protocols, the intake screening should have been administered by a "qualified mental health professional, but instead was administered by an unqualified [licensed practical nurse]." Pet. App. 45a. Plaintiffs also argued that the nurse should have been given "access to Barkes's probation records," which would have revealed that several of Barkes's answers on the suicide screening form were untruthful—although plaintiffs did not argue that either the 1997 or the 2004 NCCHC protocols required such access. *Id.* Further, plaintiffs argued that there was

evidence that "DOC's dilatory manner of supervision allowed FCM's provision of services to degrade." *Id.*

The court held that a reasonable jury could find "by failing to enforce FCM's compliance with NCCHC standards as required by their contract, Appellants were deliberately indifferent to the risk that FCM's flagging quality would result in a violation of an inmate's constitutional rights." Pet. App. 46a. The court pointed to no evidence that either Commissioner Taylor or Warden Williams was involved with supervising FCM, or that they had specific knowledge of problems with FCM's suicide prevention practices.

Judge Hardiman dissented, stating that the court's holding that "two of the most senior executives in the Delaware prison system must stand trial for the suicide of Christopher Barkes" is "a classic case of holding supervisors vicariously liable, a practice the Supreme Court proscribed in *Ashcroft v. Iqbal*." Pet. App. 48a. The dissent would have held that the Third Circuit's previous supervisory liability test "has been abrogated by *Iqbal*," *id.*, because it required plaintiffs "only [to] establish a supervisory practice or procedure that the supervisor failed to employ." *Id.* at 68a (alteration omitted). This holding "departed from the approaches taken by the Fifth, Seventh, Eighth, and Tenth Circuits," which "require[] plaintiffs to establish the supervisor's personal involvement in his subordinates' misfeasance," rather than merely "relying on the supervisor's position of authority." *Id.* at 56a-57a, 64a. However, the Third Circuit's standard was consistent with the Ninth Circuit, which allows supervisors to be held liable under section 1983 where they "knew or should have known about the dangers" complained of and failed to correct them. *Id.* at 64a.

Applying the standard used by the Fifth, Seventh, Eighth, and Tenth Circuits, the dissent would have granted summary judgment to the defendants. "[N]othing in the pleadings alleges that Taylor and Williams personally displayed deliberate indifference"; indeed, "neither Taylor nor Williams supervised FCM." Pet. App. 65a, 72a. "Nor does Barkes challenge any of the policies promulgated by the DOC." *Id.* at 65a. Instead, "Barkes has targeted [Williams and Taylor] merely as top-level DOC executives," bringing claims against them "because—in Barkes's words—[they] 'presided over a system.'" *Id.* at 66a, 72a. Therefore, the dissent warned, "[t]oday's decision invites plaintiffs to sue senior government officials whenever prison guards use force against an inmate or police officers mistreat a suspect." *Id.* at 69a.

The dissent further disagreed that there is a constitutional right "to the proper implementation of adequate suicide prevention protocols," finding such a right "inconsistent with the weight of authority" from other circuits. Pet. App. 74a. The right "to receive basic medical care does not place upon jail officials the responsibility to screen every detainee for suicidal tendencies," the dissent concluded, rejecting the majority's "contention that FCM's administration of the NCCHC's 1997 standards by an LPN amounts to cruel and unusual punishment." *Id.* at 74a-75a.

Commissioner Taylor and Warden Williams filed a petition for rehearing en banc, which was denied on October 3, 2014, with three judges voting for rehearing. Pet. App. 122a-23a.

REASONS FOR GRANTING THE PETITION

There are two compelling grounds for this Court's review of the decision below. First, the Third Cir-

cuit's holding that high-ranking prison officials can be held liable under section 1983 solely for "failure to supervise" subordinates alleged to have committed constitutional violations is contrary to this Court's holding in *Iqbal* that section 1983 does not support a claim for supervisory liability. See 556 U.S. at 677; *id.* (under section 1983, "masters do not answer for the torts of their servants"). This holding also deepens a circuit split that has developed among courts of appeals uncertain about the scope of this Court's holding in *Iqbal*: the Fifth, Seventh, Eighth, and Tenth Circuits have all held that, for a supervisor to be held liable under section 1983, he must either have been personally involved in the constitutional violation or be responsible for creating or maintaining an unconstitutional policy. See *Gates*, 537 F.3d at 435; *Vance*, 701 F.3d at 203-05; *Nelson*, 583 F.3d at 535-36; *Porro*, 624 F.3d at 1326-27. On the other hand, the Ninth Circuit—now joined by the Third Circuit—has held that supervisors can be held liable under section 1983 based on a theory that their inadequate supervision failed to prevent constitutional violations by their subordinates. See *Starr*, 652 F.3d at 1205-07. In jurisdictions where this holding is law, it will "dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties." *Gregoire* v. *Biddle*, 177 F.2d 579, 581 (2d Cir. 1949) (L. Hand, C.J.).

Second, the Third Circuit's holding that there is a constitutional right to the "proper implementation of adequate suicide prevention protocols," Pet. App. 42a, conflicts with this Court's holding that the Eighth Amendment's prohibition of cruel and unusual punishment mandates only that prison staff not be deliberately indifferent to inmates' known medical needs. The Eighth Amendment does not mandate the adop-

tion of "best practices" in prisons or constitutionalize medical malpractice claims, let alone claims based on a prison's failure to update its existing NCCHC protocols for suicide prevention screening. The Third Circuit's holding that the Eighth Amendment requires "proper implementation of adequate suicide prevention protocols" creates a split with the Fourth, Fifth, Sixth, Seventh, and Eleventh Circuits, which have held that there is no constitutional right to be screened for suicidal tendencies.

I. THE THIRD CIRCUIT'S HOLDING THAT SECTION 1983 CREATES SUPERVISORY LIABILITY CONFLICTS WITH *ASHCROFT* v. *IQBAL* AND DECISIONS OF OTHER CIRCUITS.

A. The Third Circuit's Holding That Section 1983 Creates Supervisory Liability Conflicts With *Ashcroft* v. *Iqbal*.

The Third Circuit's holding that these Delaware officials may be held liable under section 1983 for a "failure to supervise" conflicts directly with *Ashcroft* v. *Iqbal*, which holds that there is no supervisory liability under section 1983. In *Iqbal*, a federal prison inmate sued the Attorney General and the Director of the FBI, alleging that they knew of and condoned a practice of subjecting Arab Muslim detainees to harsh conditions of confinement. Among other allegations, the inmate alleged that he was beaten, kicked, subjected to needless body cavity searches, and denied the opportunity to pray due to his race, religion, and national origin. 556 U.S. at 668.

This Court held that the inmate's "account of his prison ordeal could, if proved, demonstrate unconstitutional misconduct by some governmental actors," but not by the Attorney General or the Director of the

FBI. *Id.* at 666. The Court began with the principle that "[g]overnment officials may not be held liable for the unconstitutional conduct of their subordinates under a theory of *respondeat superior*," and explained that "[b]ecause vicarious liability is inapplicable to *Bivens* and § 1983 suits, a plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution." *Id.* at 676. See also *Rizzo* v. *Goode*, 423 U.S. 362, 378 (1976) (rejecting argument that section 1983 provides a right to relief "when those in supervisory positions do not institute steps to reduce the incidence of unconstitutional police misconduct"). Based on this principle, the Court rejected the argument "that, under a theory of 'supervisory liability,' petitioners can be liable for knowledge and acquiescence in their subordinates'" constitutional violations. *Iqbal*, 556 U.S. at 677.

The plaintiffs' "conception of 'supervisory liability,'" this Court held, "is inconsistent" with the principle that government officials "may not be held accountable for the misdeeds of their agents." *Id.* Indeed, "[i]n a § 1983 suit or a *Bivens* action—where masters do not answer for the torts of their servants—the term 'supervisory liability' is a misnomer." *Id.* There is no special liability "for an official charged with violations arising from his or her superintendent responsibilities." *Id.* Rather, "[a]bsent vicarious liability, each Government official, his or her title notwithstanding, is only liable for his or her own misconduct." *Id.* Applying this standard, the Court held that the complaint had to be dismissed because, "[t]hough respondent alleges that various other defendants, who are not before us, may have [subjected him to harsh conditions] for impermissible reasons," there was no factual allegation that the Attorney

General or the Director of the FBI had done so or that the policies they had adopted were unconstitutional. *Id.* at 682-83.

As the dissent remarked, "[l]est there be any mistake, in these words the majority is not narrowing the scope of supervisory liability; it is eliminating *Bivens* supervisory liability entirely." *Id.* at 693. The essential "nature of a supervisory liability theory is that the supervisor may be liable, under certain conditions, for the wrongdoing of his subordinates, and it is this very principle that the majority rejects." *Id.*

The Third Circuit's decision here is directly contrary to *Iqbal*'s holding that there is no supervisory liability under section 1983. The Third Circuit affirmed the district court's holding that two high-ranking state government officials could be held liable under section 1983 for "failing to adequately supervise the medical treatment provided" at the prison, even though, as the district court also held, the defendants *were not deliberately indifferent* to the inmate's medical needs and had not adopted or enforced an unconstitutional policy regarding suicide prevention. Pet. App. 81a, 86a-88a. It was "undisputed" that the defendants "had no personal involvement in the events surrounding Mr. Barkes's suicide, and there is no evidence in the record to suggest that the DOC Commissioner or the HRYCI Warden had any interaction with Barkes, or knowledge of his condition." *Id.* at 117a.

The Commissioner and Warden were not even personally involved in supervising the prison medical provider. The Warden had no supervisory authority over the medical provider, and the Commissioner had lawfully delegated responsibility for supervising the medical provider to the head of the Bureau of Management Services. Pet. App. 51a-52a (dissent). Nor,

as the dissent remarked, did Barkes "challenge any of the policies promulgated by the DOC" or prison. *Id.* at 65a. Instead, Barkes challenged only the alleged failure of defendants to ensure that the prison medical provider properly implemented those policies. In short, as the dissent put it, the Warden and Commissioner were sued not based on their own actions, but solely because they "presided over a system." *Id.* at 66a. This is classic supervisory liability, which *Iqbal* forecloses.

The Third Circuit reached its result only by denying that "*Iqbal* . . . abolished supervisory liability in its entirety." Pet. App. 22a. Indeed, the court interpreted *Iqbal* to have no effect whatsoever on its supervisory liability doctrine for Eighth Amendment claims. *Id.* ("[W]e hold that the standard we announced in *Sample* for imposing supervisory liability based on an Eighth Amendment violation is consistent with *Iqbal*."). The court reasoned that this conclusion was consistent with *Iqbal* because *Iqbal* requires only that "the level of intent necessary to establish supervisory liability" be the same as "the underlying constitutional tort alleged," and Third Circuit precedent already required supervisors to display deliberate indifference, the same intent required for an underlying Eighth Amendment violation. *Id.* However, this reasoning ignores *Iqbal*'s instruction that officials may be held liable under section 1983 only when "the official's own individual actions" have "violated the Constitution." *Iqbal*, 556 U.S. at 676. Here, again, the defendants had no personal involvement, either with Barkes or with the medical provider's suicide prevention protocols, and were not even responsible for supervising the medical provider. Holding that officials may be held liable under

these circumstances reduces "deliberate indifference" to nothing more than "*respondeat superior*."

This Court's review of the Third Circuit's holding is critically important because the decision would allow plaintiffs to subject officials at the highest levels of government to litigation simply by alleging that their failure to prevent subordinates from committing violations constitutes "deliberate indifference." The "decision invites plaintiffs to sue senior government officials whenever prison guards use force against an inmate or police officers mistreat a suspect," which could lead to a flood of litigation against senior officials. Pet. App. 69a (dissent). Exposing high-level state officials to liability based on the alleged constitutional violations of lower-level employees would significantly increase the "substantial social costs" of extending liability to supervisory government officials, which "includ[e] the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties." *Anderson* v. *Creighton*, 483 U.S. 635, 638 (1987). Moreover, as this Court warned in *Iqbal*, "[l]itigation, though necessary to ensure that officials comply with the law, exacts heavy costs in terms of efficiency and expenditure of valuable time and resources that might otherwise be directed to the proper execution of the work of the Government." 556 U.S. at 685. Such unrestrained supervisory liability for "high-level officials" presents grave risks that they will be continually distracted "from the vigorous performance of their duties" by section 1983 suits. *Id.* at 686.

B. The Circuits Are In Conflict As To Whether Supervisory Liability Claims Can Be Brought Under Section 1983.

Review should be granted for the additional reason that the circuits are divided and in need of guidance

as to the availability of supervisory liability under section 1983. As the majority here put it, "[t]his aspect of *Iqbal* has bedeviled the Courts of Appeals to have considered it, producing varied interpretations of its effect on supervisory liability." Pet. App. 19a; see *id.* at 15a (remarking that the court must "wade into the muddied waters of post-*Iqbal* 'supervisory liability'"). While several circuits have now considered "this aspect of *Iqbal*, . . . consensus as to its meaning remains elusive." *Dodds* v. *Richardson*, 614 F.3d 1185, 1198 (10th Cir. 2010); see *id.* at 1209 (Tymkovich, J., concurring) (*Iqbal* "recently muddied further these already cloudy waters"); see also, *e.g.*, *Reynolds* v. *Barrett*, 685 F.3d 193, 205 n.14 (2d Cir. 2012) ("*Iqbal* has, of course, engendered conflict within our Circuit about the continuing vitality of the supervisory liability test"); *Maldonado* v. *Fontanes*, 568 F.3d 263, 274 n.7 (1st Cir. 2009) (*Iqbal* "may call into question our prior circuit law on the standard for holding a public official liable for damages under § 1983 on a theory of supervisory liability"); *Arnett* v. *Webster*, 658 F.3d 742, 757 (7th Cir. 2011) ("The landscape of [supervisory] claims after *Iqbal* remains murky . . . .").

The Fifth, Seventh, Eighth, and Tenth Circuits have all interpreted *Iqbal* as holding that "[a] supervisory official may be held liable under § 1983 only if (1) he affirmatively participates in the acts that cause the constitutional deprivation, or (2) he implements unconstitutional policies that causally result in the constitutional injury." *Gates*, 537 F.3d at 435; see *Carnaby* v. *City of Houston*, 636 F.3d 183 189 (5th Cir. 2011) (holding that "a government official can be held liable only for his own misconduct" and "the extent of his liability as a supervisor is similar to that of

a municipality that implements an unconstitutional policy").

For instance, in *Nelson* v. *Correctional Medical Services*, the Eighth Circuit rejected a section 1983 claim against the Director of the state Department of Corrections based on an inmate's allegations "that while giving birth to her child, she was forced to go through the final stages of labor with both legs shackled to her hospital bed in violation of the Eighth Amendment," causing serious and permanent damage to her hips. 583 F.3d at 524. The Eighth Circuit allowed the inmate's suit to proceed against the guard who ordered her to be shackled, but *not* against the Director of the Department of Corrections. The inmate presented no evidence that the Director, "who was responsible for managing a large state wide prison system," had "any personal involvement in [the guard's] decision to keep [the inmate] restrained while she was in labor." *Id.* at 535. Further, "[t]he regulations, directives, and orders" of the Department were not themselves unconstitutional, but rather "suggest[ed] administrative concern for the health and safety of pregnant inmates." *Id.* at 536. Because "[i]n a § 1983 case an official 'is only liable for his . . . own misconduct' and is not 'accountable for the misdeeds of [his] agents,'" the Director could not be held liable for "deliberate indifference" to the prisoner's medical needs. *Id.* at 534-35 (quoting *Iqbal*, 556 U.S. at 677) (omission and second alteration in original).

Similarly, the Seventh Circuit held in *Vance* v. *Rumsfeld* that the Secretary of Defense could not be held liable for subordinates' mistreatment of military detainees. The plaintiffs alleged that they were subjected to unconstitutional conditions of confinement including "violence, sleep deprivation and alteration,

extremes of temperature, extremes of sound, light manipulation, threats of indefinite detention, denial of food, denial of water, [and] denial of needed medical care." 701 F.3d at 196. But even if subordinates subjected the plaintiffs to unconstitutional conditions, the Seventh Circuit held, the Secretary could not be held liable because "[h]e did not arrest plaintiffs, hold them incommunicado, ... subject them to loud noises, threaten them while they wore hoods, and so on." *Id.* at 203. Under *Iqbal*, the plaintiffs' allegations that the Secretary "received reports that his subordinates sometimes used these techniques, without authorization," and "he did not do enough to bring interrogators under control," were insufficient. *Id.* "[T]he Supreme Court made it clear in *Iqbal* that such theories of liability are unavailing," absent a showing "that the public official knew of risks with sufficient specificity to allow an inference that inaction is designed to produce or allow harm." *Id.* at 204-05. Liability premised upon a supervisor's knowledge of violations, combined with inaction, "would be purely vicarious," and is therefore impermissible. *Id.* at 204. Compare *T.E.* v. *Grindle*, 599 F.3d 583, 590 (7th Cir. 2010) (allowing section 1983 claim against supervisor to proceed where "plaintiffs are not relying on a theory that 'mere failure of supervisory officials to act' violates the Due Process Clause," but instead allege that the supervisor "is liable for actively concealing reports of abuse").

The Tenth Circuit adopted a similar standard in *Porro* v. *Barnes*, holding that "[s]imply put, there's no special rule of liability for supervisors"; the test for supervisors "is the same as the test for everyone else." 624 F.3d at 1328. Accordingly, "it is evident that in order for liability to arise under § 1983, a defendant's direct personal responsibility for the

claimed deprivation of a constitutional right must be established." *Id.* at 1327 (emphasis and alteration omitted); see also *Dodds*, 614 F.3d at 1199 ("§ 1983 allows a plaintiff to impose liability upon a defendant-supervisor who creates, promulgates, implements, or in some other way possesses responsibility for the continued operation of [an unconstitutional] policy").

The Ninth Circuit, by contrast, adopted a markedly different interpretation of *Iqbal* in *Starr* v. *Baca*. Like the Third Circuit, the Ninth Circuit holds that *Iqbal* has no impact whatsoever on supervisory liability for deliberate indifference claims, concluding "[w]e see nothing in *Iqbal* indicating that the Supreme Court intended to overturn longstanding case law on deliberate indifference claims against supervisors in conditions of confinement cases." 652 F.3d at 1207. Thus, the Ninth Circuit held that "the supervisor need not be directly and personally involved in the same way as are the individual officers who are on the scene inflicting constitutional injury." *Id.* at 1205. Nor must the plaintiff demonstrate that the supervisor is responsible for an unconstitutional policy.

Instead, the Ninth Circuit holds, a supervisor may be held liable for deliberate indifference based on a wide range of theories, including "his own culpable action or *inaction in the training, supervision, or control of his subordinates*, his acquiescence in the constitutional deprivations of which the complaint is made, or conduct that showed a reckless or callous indifference to the rights of others." *Id.* at 1205-06 (emphasis supplied). Applying this standard, the Ninth Circuit held that the head of the L.A. County Jail system could be held liable for an attack on an inmate by prison guards, even though he had no in-

volvement in the attack and had not implemented an unconstitutional policy, on the theory that his "knowledge of the unconstitutional conditions in the jail, including his knowledge of the culpable actions of his subordinates, coupled with his inaction, amounted to acquiescence in the unconstitutional conduct of his subordinates." *Id.* at 1208.

Judge Trott dissented, remarking that the suit "has all the hallmarks of an attempted end run around the prohibition against using the vicarious liability doctrine of respondeat superior to get at the boss." *Id.* at 1217. Eight judges dissented from the denial of rehearing en banc, objecting that the panel "resurrects a theory of supervisory liability for constitutional torts that the Supreme Court has foreclosed." *Starr* v. *Cnty. of L.A.*, 659 F.3d 850, 851 (9th Cir. 2011) (O'Scannlain, J., dissenting). As the dissenters remarked, the standard adopted by the Ninth Circuit in *Starr*, and followed by the Third Circuit here, "has the effect of inserting *respondeat superior* liability into section 1983 despite the Supreme Court's admonition [in *Iqbal*] that 'a plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution.'" *Id.* at 854.

The petition should be granted to resolve the conflict among the circuits, and to bring the Third and Ninth Circuits back into line with this Court's holding in *Iqbal* that supervisors are not liable under section 1983 for the actions of their subordinates.

II. THE THIRD CIRCUIT'S HOLDING THAT THERE IS A CONSTITUTIONAL RIGHT TO "THE PROPER IMPLEMENTATION OF ADEQUATE SUICIDE PREVENTION PROTOCOLS" CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER CIRCUITS.

A. This Court's Decisions Make Clear That There Is No Constitutional Right To The Proper Implementation Of Adequate Suicide Prevention Protocols.

This Court's review of the Third Circuit's holding that "incarcerated person[s]" have a "clearly established" constitutional "right to the proper implementation of adequate suicide prevention protocols" is also warranted. Pet. App. 38a; see *id.* at 42a ("[W]e hold that the right Appellees assert—an incarcerated person's right to the proper implementation of adequate suicide prevention protocols—was clearly established . . . ."). As the dissent explained, "the 'right to the proper implementation of adequate suicide prevention protocols' is a departure from Eighth Amendment case law that had never been established before today." *Id.* at 76a.

Indeed, the Third Circuit's recognition of this "right" is flatly contrary to this Court's precedents. The Third Circuit reasoned that the Eighth Amendment right to be free from cruel and unusual punishment includes a right to "adequate physical and mental health care," and that this right includes protection against "an inmate's particular vulnerability to suicide." Pet. App. 39a. However, the Eighth Amendment does not create a free-standing right to adequate medical care, much less to "adequate suicide prevention protocols." As this Court explained in *Farmer* v. *Brennan*, 511 U.S. at 837, "[t]he Eighth Amendment does not outlaw cruel and unusual 'con-

ditions'; it outlaws cruel and unusual 'punishments.'" It is only a prison official's deliberate indifference to an inmate's known and serious medical needs that can render inadequate medical care a "punishment" within the meaning of the Eighth Amendment. *Id.* at 838 ("an official's failure to alleviate a significant risk that he should have perceived but did not, while no cause for commendation, cannot under our cases be condemned as the infliction of punishment"). See *Whitley* v. *Albers*, 475 U.S. 312, 319 (1986) ("It is obduracy and wantonness, not inadvertence or error in good faith, that characterize the conduct prohibited by the Cruel and Unusual Punishments Clause, whether that conduct occurs in connection with establishing conditions of confinement, supplying medical needs, or restoring official control . . . .").

Because the Eighth Amendment prohibits only cruel and unusual punishments, "[m]edical malpractice does not become a constitutional violation merely because the victim is a prisoner." *Estelle* v. *Gamble*, 429 U.S. 97, 106 (1976); see *id.* at 105-06 ("[I]n the medical context, an inadvertent failure to provide adequate medical care cannot be said to constitute 'an unnecessary and wanton infliction of pain' or to be 'repugnant to the conscience of mankind.'"). Nor does the Eighth Amendment "transform courts into boards of inquiry charged with determining 'best practices'" for prisons. *Baze* v. *Rees*, 553 U.S. 35, 51 (2008) (plurality). This "approach finds no support in our cases, would embroil the courts in ongoing scientific controversies beyond their expertise, and would substantially intrude on the role of state legislatures." *Id.*

Under these basic principles, it is clear that the Eighth Amendment does not require prisons to institute preventative screenings of every inmate to proactively identify inmates who may be suicidal or have

other latent medical needs, much less to "proper[ly] implement[]" "adequate" screening protocols. Pet. App. 38a. Instituting such screening protocols may well be a desirable "best practice," but the Constitution does not mandate it. Rather, the Eighth Amendment requires only that prison personnel respond adequately when an inmate requests medical care for a serious need, or when the inmate's need for care is otherwise brought to their attention. See *Estelle*, 429 U.S. at 105-06; *Jenkins* v. *Cnty. of Hennipin*, 557 F.3d 628, 633 (8th Cir. 2009) ("Under the Constitution, however, the range of acceptable medical care is broad. Jailers bear only the responsibility to identify medical needs that are so obvious that even a layperson would easily recognize the necessity for a doctor's attention.").

Here, although not required to do so by the Constitution, the prison medical provider implemented preventative screening programs to attempt to better serve inmates who may have latent medical issues, including mental health issues. Accordingly, the prison medical provider administered a mental health screening to Barkes, during which Barkes denied that he was suicidal and neglected to mention multiple previous suicide attempts. See 6, *supra*. Barkes also exhibited no outward signs of suicidal ideation or emotional distress in front of anyone at the prison. See *id.* While he informed his wife that he was suicidal, his wife also failed to notify anyone at the prison. See *id.* The Third Circuit held that Barkes's Eighth Amendment rights were nonetheless violated because the medical provider used a 1997 rather than a 2004 version of the screening form, had a licensed practical nurse rather than a mental health professional conduct the screening, and did not cross-check Barkes's probation records, which would have

revealed that some of his statements on the screening form were false. Pet. App. 45a.

None of these supposed flaws in Barkes's suicide prevention screening is of constitutional magnitude; the prison was not constitutionally required to provide a screening at all, and the screening provided simply does not constitute "cruel and unusual punishment." Pet. App. 74a (dissent disagreeing with "Barkes's contention that FCM's administration of the NCCHC's 1997 standards by an LPN amounts to cruel and unusual punishment"). Further, even if the majority were correct that the suicide screening represented a breach of the medical provider's contract with the Department of Corrections, a breach of contract does not violate the Eighth Amendment. See *Davis* v. *Scherer*, 468 U.S. 183, 194 (1984) ("Officials sued for constitutional violations do not lose their qualified immunity merely because their conduct violates some statutory or administrative provision."); *Luckert* v. *Dodge Cnty.*, 684 F.3d 808, 819 (8th Cir. 2012) ("Failure to follow written procedures does not constitute *per se* deliberate indifference."), *cert. denied*, 133 S. Ct. 865 (2013). The petition should be granted to correct this manifestly incorrect ruling.

B. The Third Circuit's Holding That There Is A Constitutional Right To The Proper Implementation Of Adequate Suicide Prevention Protocols Creates A Circuit Split.

Unsurprisingly, the Third Circuit's holding that there is a constitutional right to the "proper implementation of adequate suicide prevention protocols" also conflicts with the decisions of several other circuits: The Fourth, Fifth, Sixth, Seventh, and Eleventh Circuits have all held that no such right exists.

As the Sixth Circuit has cogently explained, "[i]t is one thing to ignore someone who has a serious injury and is asking for medical help; it is another to be required to screen prisoners correctly to find out if they need help." *Danese* v. *Asman*, 875 F.2d 1239, 1244 (6th Cir. 1989). Therefore, the "right to medical care for serious medical needs does not encompass the right to be screened correctly for suicidal tendencies." *Comstock* v *McCrary*, 273 F.3d 693, 702 (6th Cir. 2001); see *id.* at 703 ("to prevent the constitutionalization of medical malpractice claims," a "plaintiff alleging deliberate indifference must show more than . . . the misdiagnosis of an ailment").

The Fourth Circuit has similarly held that "[t]he general right of pretrial detainees to receive basic medical care does not place upon jail officials the responsibility to screen every detainee for suicidal tendencies." *Belcher*, 898 F.2d at 34-35. "The Eighth and Fourteenth Amendments do not contemplate liability upon the premise that all self-inflicted harm is someone else's fault." *Id.* at 36. Rather, they only "prohibit inhumane methods of punishment and assure appropriate standards of decency in a setting of detention." *Id.* Therefore, "prison officials need not screen a pretrial detainee for suicidal tendencies if they have no knowledge that the prisoner is suicidal." *Gordon* v. *Kidd*, 971 F.2d 1087, 1094 (4th Cir. 1992).

Likewise, the Fifth Circuit has concluded that, "[i]n the specific context of prison suicide prevention, . . . a failure to train custodial officials in screening procedures to detect latent suicidal tendencies does not rise to the level of a constitutional violation." *Whitt*, 529 F.3d at 284 (emphasis omitted). Thus, "[i]n the absence of manifest signs of suicidal tendencies, a city may not be held liable for a detainee's suicide in

a § 1983 suit." *Id.*; see *Burns* v. *City of Galveston*, 905 F.2d 100, 104 (5th Cir. 1990) (same).

The Seventh and Eleventh Circuits have both come to similar conclusions. The Eleventh Circuit holds that "a finding of deliberate indifference requires that officials have notice of the suicidal tendency of the individual whose rights are at issue in order to be held liable for the suicide of that individual." *Tittle*, 10 F.3d at 1539. Claims of "weaknesses in the screening process, the training of deputies and the supervision of prisoners" are insufficient to show "deliberate indifference toward the rights of prisoners." *Id.* at 1540; *Cook ex rel. Estate of Tessier* v. *Sherriff of Monroe Cnty.*, 402 F.3d 1092, 1117 (11th Cir. 2005) (same). The Seventh Circuit likewise holds that an Eighth Amendment claim based on a prisoner's suicide cannot prevail in the absence of "evidence showing that the defendants had actual knowledge of [the prisoner's] risk of suicide." *Matos ex rel. Matos* v. *O'Sullivan*, 335 F.3d 553, 557 (7th Cir. 2003). Where the prisoner "never told any of the defendants that he felt suicidal or depressed beyond his control during his incarceration . . . despite having been asked the question numerous times," his estate could not base a claim on the premise that "the defendants should have known not to take 'no' for an answer when [he] told them he was not suicidal." *Id.*

This issue of the Eighth Amendment standard related to suicide prevention protocols is important in and of itself. As the number of cases reveals, it is a recurring issue and now one that places state prison officials in the Third Circuit at risk of trial for violation of the Eighth Amendment's prohibition on cruel and unusual punishment if they fail to follow best practices in this area. In addition, the holding that state prison officials must maintain best practices

with respect to the suicide prevention protocol may be extended to other medical protocols, expanding the decision's harmful consequences. See, *e.g.*, *Gibson* v. *Cnty. of Washoe*, 290 F.3d 1175, 1196 (9th Cir. 2002) (considering a section 1983 claim based on the lack of preventative medical screening for combative inmates); *Woodberry* v. *Simmons*, 118 F. App'x 362 (10th Cir. 2004) (considering a section 1983 claim based on the lack of preventative medical screening for inmates who smoked cigarettes).

In sum, as all of these circuits which have addressed the issue have recognized, there is no constitutional right to the "proper implementation of adequate suicide prevention protocols." The Third Circuit has radically departed from the precedents of this Court and its sister circuits in creating such a right and holding that two high-ranking state officials must stand trial for violating it, particularly where, as here, suicide prevention screening occurred and the allegation is only that it had not been updated and thus was inadequate. The petition should be granted.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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February 2, 2015

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS,
THIRD CIRCUIT.

No. 12-3074

KAREN BARKES, as administratrix of the
Estate of Christopher Barkes;
Alexandra Barkes; Brittany Barkes

v.

FIRST CORRECTIONAL MEDICAL, INC.;
Stanley Taylor; Raphael Williams;
Certain Unknown Individual Employees of the
State of Delaware Department of Corrections;
Certain Unknown Individual Employees of
First Correctional Medical, Inc.; State of Delaware
Department of Corrections Stanley Taylor
and Raphael Williams,

Appellants.

Argued Sept. 24, 2013

Filed: Sept. 5, 2014

Before: AMBRO, FISHER and HARDIMAN, *Circuit Judges.*

OPINION OF THE COURT

FISHER, *Circuit Judge.*

In this appeal, we consider whether two prison administrators are entitled to qualified immunity from an Eighth Amendment claim that serious

deficiencies in the provision of medical care by a private, third-party provider resulted in an inmate's suicide. We agree with the District Court that they are not. For reasons to be discussed, we will affirm.

I.[1]

A.

Plaintiff-Appellees Karen Barkes, Alexandra Barkes, and Brittany Barkes (collectively, "Appellees") are the widow and children, respectively, of decedent Christopher Barkes ("Barkes").[2] Barkes committed suicide on November 14, 2004, while being held at the Howard R. Young Correctional Institution ("HRYCI") in Wilmington, Delaware, awaiting transportation to the Violation of Probation Center in Sussex County, Delaware. He had been arrested the previous day on an administrative warrant. Barkes was on probation for a March 2004 domestic abuse conviction, and had been arrested for loitering while waiting to purchase drugs. Appellees filed suit against then-Delaware Commissioner of Correction Stanley Taylor, then-Warden of HRYCI Raphael Williams, the Delaware Department of Corrections ("DOC"), and the third-party vendor providing medical services in HRYCI, First Correctional Medical, Inc. ("FCM"). Appellants here are Taylor and Williams.

Barkes was a troubled man with a long history of mental health and substance abuse problems. On

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[1] Because we are reviewing the District Court's denial of summary judgment on the grounds of qualified immunity, we view all disputed facts in the light most favorable to the party claiming injury. *Wright v. City of Phila.*, 409 F.3d 595, 597 n. 1, 599 (3d Cir.2005).

[2] Karen Barkes appears both in her individual capacity and as administrator of Barkes's estate.

March 15, 1997, Barkes killed two people in a car accident while driving drunk. He pleaded guilty to two counts of second-degree vehicular homicide. Seven months after the accident, on October 31, 1997, Barkes attempted suicide while incarcerated by ingesting an overdose of pills that he had apparently stockpiled. He was incarcerated at HRYCI (also known as Gander Hill Prison), the same facility at which he would eventually commit suicide in 2004.

Barkes served two and a half years in prison, during which time he completed a substance abuse program. He stayed sober for approximately four years before relapsing in December 2003. He entered the Recovery Center for Delaware on December 15, 2003, but could stay for only one week because of limited funding from his insurance provider. On December 21, 2003, police responded to a reported domestic altercation at Barkes's home. After police placed him in handcuffs, he became unconscious and unresponsive. Paramedics were called, who opened Barkes's airways, provided oxygen, and administered drugs to counteract a suspected heroin overdose. Barkes admitted—and the toxicology report in his medical records confirms—that he consumed one and a half pints of vodka and a "bag" of heroin, quantity unspecified. He later characterized this overdose as a suicide attempt.

Shortly before the December 2003 relapse, Barkes checked himself into the Rockford Center in Wilmington, Delaware, where he was diagnosed with post-traumatic stress disorder. David Becker, Barkes's probation officer at the time, opined that Barkes was "[n]ot only . . . a threat to the community, he is also a threat to himself," in a "violation report" dated February 3, 2004. JA at 296.

On September 10, 2004, sixty-five days before his death, Barkes attempted to kill himself twice in one day. During an afternoon house visit by a probation officer, Barkes was found asleep on top of a bottle of gin. He appeared to be extremely intoxicated—he apparently could not recall who he was—and the officer arrested Barkes. Two hours after his arrest, Barkes had a blood alcohol content ("BAC") of .222. Because of his high BAC the officers took Barkes to a hospital, where he admitted to a nurse that he had also consumed forty Tylenol tablets. While being treated, Barkes attempted to kill himself by wrapping an IV cord around his neck. Both incidents were recorded in his probation file.

Barkes received a new probation officer shortly before his death. In notes dated November 9, 2004—five days before he died—the officer indicated her awareness that Barkes suffered from bipolar disorder, attended one therapy session and six Alcoholics Anonymous meetings each week, and took four medications for his bipolar condition and other mental health problems. The notes also acknowledged three individuals—the record suggests that they were therapists, counselors, and/or social workers—whom Barkes was currently seeing.

Barkes was arrested on November 13, 2004 for violating his probation. At approximately 3:00 p.m. that day, he underwent a medical intake/screening procedure at HRYCI conducted by a licensed practical nurse ("LPN") who was employed by FCM, a private contractor hired to provide medical services in the prison. The intake procedure included a form containing questions about Barkes's mental health, including questions about suicidal ideation. Barkes indicated on the form that he had attempted suicide in

2003 but did not include the 1997 attempt or the two attempts in September 2004. He stated that he had no current suicidal ideation.

The intake procedure also screened for seventeen suicide risk factors. If the inmate checked eight or more factors on a form, or if certain other serious risk factors were present (for example, the arresting officer expressed concern that the inmate was a suicide risk), the on-call physician was to be notified and suicide prevention measures initiated. Barkes answered yes to two of the questions: (1) that he had a psychiatric history; and (2) that he had previously attempted suicide. The LPN completed a standard medical intake form, which included questions as to whether Barkes showed signs of "altered mental status . . . or abnormal conduct." JA at 71. The LPN indicated "no" to both. Barkes also denied having a history of drug abuse. The LPN referred Barkes to mental health services on a "routine" urgency level, based on his psychiatric history and the 2003 suicide attempt.

Barkes was placed alone in a cell in the booking and receiving area. At some point during the evening of November 13, Barkes called his wife Karen. According to Karen, Barkes told her that he "can't live this way anymore," and said that he was going to kill himself. JA at 2, 72. It is undisputed that Karen did not inform the DOC of Barkes's stated intent.

Shortly before 4:00 a.m. on November 14th, in an unrelated incident, another inmate at HRYCI was transferred to the infirmary from his cell and placed on Psychiatric Close Observation, Level II ("PCO II"). Patients placed on PCO II are given a "suicide gown" and are checked every 15 minutes by staff. Appellants' Br. at 10 (citing *Lamb v. Taylor,* No. 08-324, 2011 WL 4006586, at *2 n. 1 (D.Del. Sept. 8, 2011) (describing

medical care at HRYCI in the context of another lawsuit arising out of a prison suicide)).

At 8:00 a.m. on the 14th, Barkes ate breakfast alone in his cell. Correctional officers observed him lying awake on his bed at 10:45, 10:50, and 11:00 a.m., and none recalled anything unusual about him or any indication that he was suicidal. At 11:35 a.m., when an officer arrived at his cell to deliver his lunch, Barkes was hanging by a sheet from a steel partition. Medical staff responded and Barkes was taken to a hospital, but attempts to resuscitate him were unsuccessful.

B.

FCM entered into a Health Care Services Contract with DOC on June 17, 2002, and was the contracted medical provider at HRYCI at the time of Barkes's suicide. In that role it was responsible for inmate intake and medical screening. The DOC reviewed FCM's performance in monthly Medical Review Committee ("MRC") meetings, overseen by DOC Bureau Chief of Management Services Joyce Talley. Talley was the DOC's appointed representative for administering the contract with FCM. *See* Del.Code Ann. tit. 11, § 6517(13) (currently codified at Del.Code Ann. tit. 11, § 6517(12)) (requiring that the Commissioner of Correction "[a]dminister[ ] the medical/treatment services contract, or appoint[ ] a designee to administer the medical/treatment contract").

As Chief of the DOC Bureau of Management Services, Talley had many responsibilities. She testified that her areas of oversight responsibility included "fiscal, payroll, budgeting, food services for the inmates, health care for the inmates, substance abuse for the inmates, management information

systems, purchasing and warehousing, facilities maintenance and construction." JA at 364-65. She further testified that, in each of these areas except for health care, she relied on a "key manager [to do] the day-to-day" oversight. JA at 366. The "key manager" was an official within the DOC, but with respect to health care services Talley relied on FCM and the MRC, testifying that she did not make any assessments regarding FCM's job performance and that no individual working with n the DOC "had the knowledge or the background . . . [to] go out to see if the medical care was provided." JA at 367.

The contract outlined standards of care to which FCM must adhere. To the extent that the health care standards of the American Correctional Association and the National Commission on Correctional Health Care ("NCCHC") differed, FCM was to adhere to the higher standard. Taylor testified that he believed that ensuring FCM "deliver[ed] health care in accordance with NCCHC standards" was sufficient to meet his responsibility to deliver health care to the inmate population. JA at 51. Williams testified that he had a responsibility to ensure that HRYCI was in compliance with NCCHC standards, but that he believed he had no personal responsibility to ensure FCM's compliance. JA at 55. Talley also testified that she did not believe it to be her responsibility to ensure FCM's compliance with NCCHC standards. JA at 368 ("Q: Did you believe that it was your responsibility when you served in that role as bureau chief that you reviewed the compliance with the standards set forth by NCCHC? A: No.").

In 1997, NCCHC published standards for use by correctional facilities to screen inmates for physical and mental health problems during the intake

process. These standards included a variety of forms to be completed by medical intake staff. The NCCHC altered its standards in 2003, doing away with the forms and instead instituting a narrative recommendation of various mental health warning signs of which all prison staff should be aware and vigilant. Though FCM appears to have been relying on the outdated 1997 forms in 2004 when Barkes was incarcerated, NCCHC accredited HRYCI approximately one year before Barkes's suicide. However, part of Appellees' theory of liability is that not only did FCM fail to implement the newer guidelines as required by its contract, it failed to properly implement the 1997 NCCHC standards. Therefore, it is necessary to discuss the 1997 NCCHC standards for suicide assessment in some detail.

The 1997 NCCHC guidelines provided a number of sample intake forms covering general physical and mental health questions.[3] These included a suicide-specific assessment form that asked questions regarding past and current suicidal ideation, mental health treatment, and recent emotional trauma. JA at 310. There was also a mental health screening form that was to be filled out by the intake staff member. The mental health form instructed the screener to ask the inmate, in pertinent part: "Have you ever felt so bad, so depressed, that you tried to take your

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[3] For example, the first two questions on the general intake screening form are: "Was inmate a medical, mental health or suicide risk during any prior contact or confinement with department?"; and "Do you believe the inmate is a medical, mental health or suicide risk now?" JA at 309. That form also allows the screener to record behavioral observations about the inmate and whether they suffer from health problems such as heart disease or epilepsy.

own life?"; and "Have you ever taken medication for emotional problems, for mental illness, or for 'nerves?'" JA at 313. The following page of the standards provided criteria for referring an inmate to a mental health professional based on answers given in the mental health screening form, which stated:

> Refer an inmate to mental health staff for assessment if the inmate gives a "Yes" response to ANY question. There are no exceptions to this procedure. If the inmate gives an affirmative response to question 9,[4] make an immediate referral to mental health staff and make sure continuous "eyes on" supervision is provided until seen by the mental health staff.
>
> Remember, this screening inventory IS NOT your only guide for referral to mental health services. Even if there are all "no" answers, you may still refer the inmate:
>
> - if you suspect that, in spite of the answers, this inmate is experiencing some emotional difficulties;
> - if you need additional mental health information on an inmate prior to classification;
> - or for reasons not listed here

JA at 314 (emphasis in original).

The 1997 guidelines provided sample protocols to be administered by a qualified mental health professional if the inmate's intake screening triggered referral. JA at 322. The guidelines explicitly required

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[4] Question 9 inquired whether the inmate was currently considering killing himself.

the protocols to be administered by a mental health professional.

Appellees claim, however, that FCM failed to comply with the 1997 NCCHC standards. They argue that the suicide screening form that FCM administered corresponded to the screening form to be used by a mental health professional, but that FCM allowed the form to be administered by an unqualified LPN rather than a qualified mental health professional, as required under NCCHC guidelines. To put it simply, Appellees claim that, if FCM had been in compliance with NCCHC standards, Barkes's "yes" answer to the question "Have you ever attempted suicide?" and his identification of his psychiatric medication would have triggered a referral to a mental health professional. The professional in turn would have instituted increased suicide prevention procedures, thus preventing Barkes's death.

In deposition testimony, Appellants acknowledged that they were aware of the deteriorating quality of FCM's provision of medical services. Williams admitted that FCM's performance had degraded significantly and that he was aware FCM may not have been fulfilling its contractual obligations. JA at 792. He was aware of significant backlogs, that FCM may have been intentionally short-staffing to save money, and that inmate complaints had increased. JA at 792-93. Taylor testified that his responsibility as Commissioner of Correction was to "provide health care delivery to the offender population comparable to that available in the community." JA at 799. He acknowledged that in the period of 2003-2007 audits conducted by the NCCHC had identified deficiencies in healthcare provision in the Delaware prison system. He also suspected that FCM was intentionally leaving

positions vacant in order to save money rather than simply having difficulty recruiting and retaining staff. Minutes from a meeting of the MRC on June 17, 2004, at which Williams was present, indicate ongoing problems with the DOC's document management computer system, called "DACS," including that the medical unit at HRYCI was "not putting information into DACS consistently for medical grievances." JA at 809. Talley indicated that FCM was "beyond the borderline of not being in compliance with the contract" and that the MRC would issue a letter of non-compliance at the next meeting if problems with the computer system were not resolved by then. *Id.* Minutes from the MRC's August 26, 2004 meeting indicate that FCM remained non-compliant with respect to implementing the DACS system, and that this issue was to be brought to Taylor's attention. In May 2005, Taylor wrote a letter to FCM indicating that the DOC would be terminating the contract, citing among his reasons "the serious deficiencies in the delivery of health care outlined in the National Commission on Correctional Health Care (NCCHC) audit report dated February 28, 2005." JA at 788.

C.

On February 16, 2006, Appellees filed a complaint pursuant to 42 U.S.C. § 1983 in the United States District Court for the District of Delaware.

Appellees asserted against Taylor and Williams an Eighth Amendment claim based on deliberate indifference to Barkes's serious medical needs, an Eighth Amendment claim based on a failure to train/wrongful customs, practices, and policies, and a state law wrongful death claim. On February 27, 2008, the District Court granted summary judgment to Appellants. Appellees filed an appeal, *see Barkes*

v. First Correctional Medical, Inc., No. 08-2280 (docketed May 7, 2008), which we dismissed per stipulation of the parties on July 9, 2008.

On May 21, 2008, while the first appeal was pending, the District Court held a show cause hearing on Appellees' motion for default judgment against FCM. At that hearing, the Court granted the motion and granted Appellees leave to amend. They filed a first amended complaint on June 13, 2008, which Appellants moved to strike on the basis that it reasserted claims upon which they had already prevailed on summary judgment. The Court granted the motion to strike on March 30, 2009, but permitted Appellees to file a second amended complaint against Appellants provided that it did not assert any claims from the previous complaint. Appellees filed a second amended complaint on April 9, 2009, which was eventually dismissed.[5] Appellees were permitted to file a third amended complaint only to add an Eighth Amendment failure-to-supervise claim, which was filed on April 22, 2010. Appellants moved to dismiss

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[5] It appears that the first amended complaint was filed in the District Court before we had dismissed Appellees' appeal, which we dismissed while the motion to strike was pending. In the briefing on the motion to strike, the parties discussed the then-pending appeal only to acknowledge that it was premature because claims remained against FCM in the District Court. No party has raised before us now, and we therefore do not consider, whether the District Court was without jurisdiction to grant Appellees leave to file the first amended complaint. *See Bensalem Twp. v. Int'l Surplus Lines Ins. Co.*, 38 F.3d 1303, 1314 (3d Cir.1994) (noting the general rule that the filing of an appeal divests a district court of jurisdiction, but with the exception that "a premature notice of appeal does not") (internal quotation marks and citation omitted). If any error existed, it was mooted when the District Court struck the first amended complaint and granted leave to file a second amended complaint.

the third amended complaint on May 6, 2010, and the District Court denied the motion.

On February 27, 2012, the parties filed cross-motions for summary judgment. It was then that Appellants asserted qualified immunity in a motion for the first time.[6] The District Court denied both motions for summary judgment, and Appellants filed this appeal pursuant to the collateral order doctrine.

II.

The district court had jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343. We have jurisdiction pursuant to 28 U.S.C. § 1291 and the collateral order doctrine. The collateral order doctrine allows us to review an interlocutory order "as a 'final decision' if it: '(1) conclusively determine[s] the disputed question, (2) resolve[s] an important issue completely separate from the merits of the action, and (3) [is] effectively unreviewable on appeal from a final judgment.'" *Blaylock v. City of Phila.*, 504 F.3d 405, 408 (3d Cir.2007) (alterations in original) (quoting *Johnson v. Jones*, 515 U.S. 304, 310, 115 S.Ct. 2151, 132 L.Ed.2d

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[6] Though it is undisputed that Appellants raised qualified immunity in their answer to the third amended complaint, *see* JA at 210, Appellees devote a substantial portion of their brief to a discussion of Appellants' failure to assert the defense until so late in this litigation. In their briefs, they do not suggest that this is of any legal significance—that Appellants waived the defense, for instance—but only that it is supposedly "revelatory of [Appellants'] mindset" regarding the merits of their qualified immunity argument. Appellees' Br. at 22. At oral argument, counsel for Appellees went a step further and asked that we find waiver of qualified immunity. Because Appellants asserted qualified immunity in their answer, waiver is inappropriate, and whether or not they exhibit confidence in their assertion of qualified immunity is of no relevance to this appeal. *See Cetel v. Kirwan Fin. Grp.*, 460 F.3d 494, 506 (3d Cir.2006).

238 (1995)). It is well-established that orders denying qualified immunity at summary judgment are reviewable under the collateral order doctrine "to the extent that denial turns on questions of law." *Bayer v. Monroe Cnty. Children and Youth Serv.*, 577 F.3d 186, 191 (3d Cir.2009); *see also Wright v. City of Phila.*, 409 F.3d 595, 599 (3d Cir.2005) ("Despite the interlocutory nature of qualified immunity rulings, they are reviewable on appeal where the dispute does not turn upon which facts the parties might be able to prove, but, rather, whether or not certain facts showed a violation of 'clearly established' law." (internal quotation marks and citation omitted)).

"On an appeal from a grant or denial of summary judgment, our review is plenary and we apply the same test the district court should have utilized initially." *Giles v. Kearney*, 571 F.3d 318, 322 (3d Cir.2009). A court may grant summary judgment only when the record "shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(a). The issue of qualified immunity is generally a question of law, but a genuine dispute of material fact will preclude summary judgment on qualified immunity. *Giles*, 571 F.3d at 326.

III.

A.

1.

Before discussing the District Court's qualified immunity analysis, it is necessary first to consider whether and to what extent our precedent on supervisory liability in the Eighth Amendment context was altered by the Supreme Court's decision in *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937, 173

L.Ed.2d 868 (2009). Though we have in the past declined "to wade into the muddied waters of post-*Iqbal* 'supervisory liability,'" *Bistrian v. Levi*, 696 F.3d 352, 366 n. 5 (3d Cir.2012); *see also Argueta v. U.S. Immigration and Customs Enforcement*, 643 F.3d 60, 69-70 (3d Cir.2011), we find it appropriate to do so now.

Section 1983 provides a cause of action against "every person who," under color of state law, "subjects, or causes to be subjected," another person to a deprivation of a federally protected right. 42 U.S.C. § 1983. It is well-recognized that "[g]overnment officials may not be held liable for the unconstitutional conduct of their subordinates under a theory of *respondeat superior*." *Bistrian*, 696 F.3d at 366 (alteration in original) (quoting *Iqbal*, 556 U.S. at 676, 129 S.Ct. 1937). Rather, state actors are liable only for their own unconstitutional conduct. *Id.* With this principle in mind, we have previously identified two general ways in which a supervisor-defendant may be liable for unconstitutional acts undertaken by subordinates. First, liability may attach if they, "with deliberate indifference to the consequences, established and maintained a policy, practice or custom which directly caused [the] constitutional harm." *A.M. ex rel. J.M.K. v. Luzerne Cnty. Juvenile Det. Ctr.*, 372 F.3d 572, 586 (3d Cir.2004) (alteration in original) (quoting *Stoneking v. Bradford Area Sch. Dist.*, 882 F.2d 720, 725 (3d Cir.1989)). Second, "a supervisor may be personally liable under § 1983 if he or she participated in violating the plaintiff's rights, directed others to violate them, or, as the person in charge, had knowledge of and acquiesced" in the subordinate's unconstitutional conduct. *Id.* (citing *Baker v. Monroe Twp.*, 50 F.3d 1186, 1190-91 (3d Cir.1995)). "Failure to" claims—failure to train, failure

to discipline, or, as is the case here, failure to supervise—are generally considered a subcategory of policy or practice liability. *See* Rosalie Berger Levinson, *Who Will Supervise the Supervisors? Establishing Liability for Failure to Train, Supervise, or Discipline Subordinates in a Post*-Iqbal/Connick *World,* 47 Harv. C.R.-C.L. L.Rev. 273, 280 (2012).

In *Sample v. Diecks,* we recognized that "'supervision' entails, among other things, training, defining expected performance by promulgating rules or otherwise, monitoring adherence to performance standards, and responding to unacceptable performance whether through individualized discipline or further rulemaking." 885 F.2d 1099, 1116 (3d Cir.1989). *Sample* involved an Eighth Amendment claim against a supervisor for implementing deficient policies and being deliberately indifferent to the risk that the policies would result in the deprivation of a constitutional right. *Id.; see also Beers-Capitol v. Whetzel,* 256 F.3d 120, 133-34 (3d Cir.2001) (discussing *Sample*). We developed a four-part test for determining whether an official may be held liable on a claim for a failure to supervise. The plaintiff must identify a supervisory policy or practice that the supervisor failed to employ, and then prove that: (1) the policy or procedures in effect at the time of the alleged injury created an unreasonable risk of a constitutional violation; (2) the defendant-official was aware that the policy created an unreasonable risk; (3) the defendant was indifferent to that risk; and (4) the constitutional injury was caused by the failure to implement the supervisory practice or procedure. *Sample,* 885 F.2d at 1118; *Brown v. Muhlenberg Twp.,* 269 F.3d 205 (3d Cir.2001). In this Circuit, when a plaintiff seeks to hold a defendant liable under the Eighth Amendment in his or her role as a supervisor,

"*Sample's* four-part test provides the analytical structure . . ., it being simply the deliberate indifference test applied to the specific situation of a policymaker." *Whetzel,* 256 F.3d at 135.

Which brings us to *Iqbal.* Javaid Iqbal sued United States Attorney General John Ashcroft and FBI Director Robert Mueller, high-level Executive Branch officials, under *Bivens v. Six Unknown Federal Narcotics Agents,* 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971). In *Bivens,* the Court "'recognized for the first time an implied private action for damages against federal officers alleged to have violated a citizen's constitutional rights.'" *Iqbal,* 556 U.S. at 675, 129 S.Ct. 1937 (quoting *Corr. Serv. Corp. v. Malesko,* 534 U.S. 61, 66, 122 S.Ct. 515, 151 L.Ed.2d 456 (2001)). Iqbal alleged that he was unlawfully detained and subjected to harsh conditions of confinement on the basis of his race, religion, or national origin, as part of a purposefully discriminatory policy of which Ashcroft was the "principal architect" and Mueller was "instrumental" in executing. *Id.* at 669, 129 S.Ct. 1937. Iqbal's theory of supervisory liability was that Ashcroft and Mueller could be liable if they had "knowledge [of] and [had] acquiesce[ed] in their subordinates' use of discriminatory criteria to make classification decisions among detainees." *Id.* at 677, 129 S.Ct. 1937 (internal citation and quotation marks omitted).

In rejecting Iqbal's claim, the Supreme Court first recognized that "[t]he factors necessary to establish a *Bivens* violation will vary with the constitutional provision at issue." *Id.* at 676, 129 S.Ct. 1937. The claim presented in *Iqbal*—discrimination in violation of the First and Fifth Amendments—requires that the

plaintiff prove that the defendant acted with a discriminatory purpose, and "purposeful discrimination requires more than 'intent as volition or intent as awareness of consequences.'" *Id.* (quoting *Personnel Adm'r of Mass. v. Feeney,* 442 U.S. 256, 279, 99 S.Ct. 2282, 60 L.Ed.2d 870 (1979), and citing *Church of Lukumi Babalu Aye, Inc. v. Hialeah,* 508 U.S. 520, 540-41, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993); *Washington v. Davis,* 426 U.S. 229, 240, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976)). The Court reasoned that, because such a claim requires that the defendant have acted "'because of,' not merely 'in spite of,' [the action's] adverse effects upon an identifiable group,'" *id.* at 676-77, 129 S.Ct. 1937 (some internal quotation marks omitted) (quoting *Feeney,* 442 U.S. at 279, 99 S.Ct. 2282), it necessarily followed that Ashcroft and Mueller could be held liable only if they had "adopted and implemented the detention policies at issue . . . *for the purpose of* discriminating on account of race, religion, or national origin," *id.* (emphasis added). The Court rejected Iqbal's argument that supervisory liability could attach based on Ashcroft and Mueller's knowledge of and acquiescence in their subordinates' unconstitutional discrimination, stating: "In a § 1983 suit or a *Bivens* action—where masters do not answer for the torts of their servants—the term 'supervisory liability' is a misnomer. Absent vicarious liability, each Government official, his or her title notwithstanding, is only liable for his or her own misconduct." *Id.* at 677, 129 S.Ct. 1937. In reaching this conclusion, the Court expressly tied the level of intent necessary for superintendent liability to the underlying constitutional tort. *See id.* at 678, 129 S.Ct. 1937 ("In the context of determining whether there is a violation of clearly established law to overcome qualified immunity, purpose rather than knowledge is required

to impose *Bivens* liability on the subordinate for unconstitutional discrimination; the same holds true for an official charged with violations arising from his or her superintendent responsibilities.").

This aspect of *Iqbal* has bedeviled the Courts of Appeals to have considered it, producing varied interpretations of its effect on supervisory liability. The dissenters in *Iqbal* believed the majority to be abolishing supervisory liability in its entirety, 556 U.S. at 692-93, 129 S.Ct. 1937 (Souter, J., dissenting), and at least one Court of Appeals impliedly confirmed this view, albeit without much in the way of discussion, *see Carnaby v. City of Houston*, 636 F.3d 183, 189 (5th Cir.2011).[7] The Ninth Circuit, on the other hand, has suggested that under *Iqbal* the United States Attorney General could be liable for knowingly "fail[ing] to act in the light of even unauthorized abuses" of the federal material witness statute, insofar as that statute was used as a pretext to detain terrorism suspects despite a lack of probable cause of a criminal violation. *See al-Kidd v. Ashcroft*, 580 F.3d 949, 976 (9th Cir.2009), *overruled on other grounds*, ____ U.S. ____, 131 S.Ct. 2074, 179 L.Ed.2d 1149 (2011) (overruling the Ninth Circuit on the basis of qualified immunity, finding no Fourth Amendment violation, and not reaching the supervisory liability question).

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[7] In *Carnaby*, the Fifth Circuit affirmed a grant of summary judgment in favor of a police officer whose alleged supervisory failure led other officers to commit an excessive use of force. 636 F.3d at 189. The Court cited *Iqbal* for the proposition that "[u]nder § 1983 . . . a government official can be held liable only for his own misconduct," *id.* (citing *Iqbal*, 556 U.S. at 692-93, 129 S.Ct. 1937), but did not consider whether a failure to supervise could in some instances *be* misconduct.

Most courts have gravitated to the center, recognizing that because the state of mind necessary to establish a § 1983 or *Bivens* claim varies with the constitutional provision at issue, so too does the state of mind necessary to trigger liability in a supervisory capacity. The Tenth Circuit, for example, held that, after *Iqbal*, § 1983 liability may attach to "a defendant-supervisor who creates, promulgates, implements, or in some other way possesses responsibility for the continued operation of a policy the enforcement (by the defendant-supervisor *or her subordinates*) of which 'subjects, or causes to be subjected,'" the plaintiff to a constitutional deprivation, if the supervisor "acted with the state of mind required to establish the alleged constitutional deprivation." *Dodds v. Richardson*, 614 F.3d 1185, 1199 (10th Cir.2010) (emphasis added). The Court of Appeals in *Dodds* reasoned that such a standard "complies with *Iqbal*'s requirement that § 1983 liability only be imposed upon those defendants whose own individual actions cause a constitutional deprivation because it requires plaintiffs [to] prove each defendant took some act with the constitutionally applicable state of mind that caused the alleged constitutional violation." *Id.* at 1200. The Ninth Circuit agreed with this view in *Starr v. Baca*, seeing "nothing in *Iqbal* indicating that the Supreme Court intended to overturn longstanding case law on deliberate indifference claims against supervisors in conditions of confinement cases." 652 F.3d 1202, 1207 (2011). *See also Whitson v. Stone County Jail*, 602 F.3d 920, 922, 927-28 (8th Cir.2010) (holding that prison supervisors could be liable on an Eighth Amendment claim "only if they personally displayed deliberate indifference to the risk" of a constitutional deprivation); *Sanchez v. Pereira-Castillo*, 590 F.3d 31, 49 (1st

Cir.2009) (holding, post-*Iqbal*, that prison administrators could be liable in a supervisory capacity for a Fourth Amendment violation if their "actions displayed deliberate indifference toward the rights of third parties and had some causal connection to the subsequent tort") (quoting *Camilo-Robles v. Zapata*, 175 F.3d 41, 44 (1st Cir.1999)).

The Seventh Circuit has also indicated that the mental state required to impose supervisory liability will vary with the underlying constitutional tort. In *T.E. v. Grindle*, the Seventh Circuit held that a school principal could be liable under § 1983 for allowing a subordinate teacher to continue working despite numerous allegations that the teacher was sexually abusing his female students. 599 F.3d 583, 585-87 (7th Cir.2010). The plaintiff alleged supervisory liability that derived from both substantive due process and equal protection violations. The Court recognized that *Iqbal* had abrogated its prior precedent allowing plaintiffs to recover from a supervisor who was deliberately indifferent toward a subordinate's purposeful discrimination, because in a discrimination claim *Iqbal* requires that "a plaintiff must show that the supervisor possessed . . . discriminatory intent." *Id.* But this was not so with respect to the substantive due process claim, for which the Court held that "[w]hen a state actor's deliberate indifference deprives someone of his or her protected liberty interest . . ., that actor violates the Constitution, regardless of whether the actor is a supervisor or subordinate." *Id.* at 591. The Court thus recognized that the mental state necessary for supervisory liability tracks with the mental state required for the underlying tort. *See also Vance v. Rumsfeld*, 701 F.3d 193, 204 (7th Cir.2012) (en banc).

We do not read *Iqbal* to have abolished supervisory liability in its entirety. Rather, we agree with those courts that have held that, under *Iqbal*, the level of intent necessary to establish supervisory liability will vary with the underlying constitutional tort alleged. In this case, the underlying tort is the denial of adequate medical care in violation of the Eighth Amendment's prohibition on cruel and unusual punishment, and the accompanying mental state is subjective deliberate indifference. *See Farmer v. Brennan*, 511 U.S. 825, 847, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994). *Iqbal* held that state officials are liable only for their *own* unconstitutional actions. The essence of the type of claim we approved in *Sample* is that a state official, by virtue of his or her *own* deliberate indifference to *known* deficiencies in a government policy or procedure, has allowed to develop an environment in which there is an unreasonable risk that a constitutional injury will occur, and that such an injury *does* occur. Liability in such a situation is, as *Iqbal* requires, imposed not vicariously but based on the supervisor's own misconduct, because to exhibit deliberate indifference to such a situation is a culpable mental state under the Eighth Amendment. *See Starr*, 652 F.3d at 1207 ("[W]hen a supervisor is found liable based on deliberate indifference, the supervisor is being held liable for his or her own culpable action or inaction, not held vicariously liable for the culpable action or inaction of his or her subordinates."). Accordingly, we hold that the standard we announced in *Sample* for imposing supervisory liability based on an Eighth Amendment violation is consistent with *Iqbal*. We leave for another day the question whether and under what circumstances a claim for supervisory liability

derived from a violation of a different constitutional provision remains valid.

2.

Our dissenting colleague disagrees with our conclusion that *Sample* has survived *Iqbal*. In his view, a supervisor can be held liable under the Eighth Amendment only if he committed an affirmative "action[ ]," was "personal[ly] involve[d] in his subordinates' misfeasance," and acted with "intentional . . . deliberate indifference." Dis. Op. at 336, 340 (internal quotation marks omitted). Our colleague claims that his position recognizes that "there's no special rule of liability for supervisors" and that "the test for them is the same as the test for everyone else." *Id.* at 342 (internal quotation marks omitted) (quoting *Porro v. Barnes*, 624 F.3d 1322, 1327-28 (10th Cir.2010)). But in fact the opposite is true: his test would immunize from liability prison officials who were deliberately indifferent to a substantial riskthat inmates' serious medical conditions were being mistreated or not treated at all. This would subvert the Supreme Court's command that *any* prison official who, "acting with deliberate indifference, expose[s] a prisoner to a sufficiently substantial risk of serious damage to his future health," violates the Eighth Amendment. *Farmer*, 511 U.S. at 844, 114 S.Ct. 1970 (internal quotation marks and citations omitted). Simply because an official may have a senior position in the DOC does not make him free to ignore substantial dangers to inmate health and safety. *Id.* at 842, 114 S.Ct. 1970; *Grindle*, 599 F.3d at 590 ("When a state actor's deliberate indifference deprives someone of his or her protected liberty interest in bodily integrity, that actor violates the Constitution, regardless of whether the actor is a

supervisor or subordinate, and the actor may be held liable for the resulting harm.").

Treating supervisors and subordinates equally under the Eighth Amendment does not mean ignoring the different ways in which each type of officer can, with deliberate indifference, expose inmates to constitutional injury. We think our dissenting colleague fails to recognize this fact, and in doing so makes three significant analytical errors. We address each below.

i.

First, the Dissent claims that for a supervisor to be liable under § 1983, he must have taken a "deliberate, intentional act . . . to violate the plaintiff's legal rights." Dis. Op. at 338 (quoting *Porro,* 624 F.3d at 1327-28). The Dissent draws this principle primarily from the Tenth Circuit's opinion in *Porro,* which we have cited with approval for its discussion of the mental state required to make out a claim of supervisory liability. But on this particular point the Dissent's reliance is off-base. *Porro* involved an allegation of excessive force by an officer, for which the plaintiff also sued the Sheriff (and his successor) as supervisor. 624 F.3d at 1324-25. In affirming the district court's grant of summary judgment to the Sheriff, the Tenth Circuit began by identifying the precise constitutional tort at issue: the use of excessive force in violation of the due process clause. *Id.* at 1326. The court stated that for a supervisor to be liable, he must have committed a "deliberate, intentional act." *Id.* at 1327-28. Importantly, it made this statement in the context of an excessive force claim, which meant that "the focus [was] on the force the supervisor used or caused to be used, the resulting injury attributable to his conduct, and the *mens rea* required of him to be

held liable, which can be no less than the *mens rea* required of anyone else." *Id.* at 1328 (emphasis omitted). But excessive force claims are different than conditions of confinement claims: instead of deliberate indifference, they require a plaintiff to show that "officials applied force 'maliciously and sadistically for the very purpose of causing harm,' or . . . with 'a knowing willingness that [harm] occur.'" *Farmer*, 511 U.S. at 835-36, 114 S.Ct. 1970 (quoting *Hudson v. McMillian*, 503 U.S. 1, 6-7, 112 S.Ct. 995, 117 L.Ed.2d 156 (1992)). Under the rule we derive from *Iqbal*—that the mental state necessary for supervisory liability will vary with the substance of the underlying constitutional tort—it makes sense that the Tenth Circuit would require deliberate action in that case.

The Dissent's position neglects the black-letter principle that the type of Eighth Amendment claim alleged here can be shown by an act *or an omission*. *See Farmer*, 511 U.S. at 835, 114 S.Ct. 1970 ("[T]he cases are . . . clear that [the deliberate indifference standard] is satisfied by something less than acts *or omissions* for the very purpose of causing harm or with knowledge that harm will result" (emphasis added)); *Estelle v. Gamble*, 429 U.S. 97, 106, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976) ("In order to state a cognizable claim [under the Eighth Amendment], a prisoner must allege acts *or omissions* sufficiently harmful to evidence deliberate indifference to serious medical needs." (emphasis added)). What the Dissent attempts to do is shoehorn into the Eighth Amendment the deliberate-act requirement adopted in our state-created-danger jurisprudence. In that context, we have held that "[l]iability . . . [must be] predicated upon the states' *affirmative acts* which work to the plaintiff's detriment in terms of exposure to danger. It is the *misuse of state authority, rather than a failure to*

use it, that can violate the Due Process Clause." *Phillips v. Cnty. of Allegheny,* 515 F.3d 224, 235 (3d Cir.2008) (third alteration added; emphasis in original) (quoting *Bright v. Westmoreland Cnty.,* 443 F.3d 276, 282 (3d Cir.2006)).[8] The reason for this requirement is that the Government is not generally required to "guarantee [a] certain minimal level[ ] of safety and security" to its citizens. *Bright,* 443 F.3d at 280 (quoting *DeShaney v. Winnebago Cnty. Soc. Servs. Dep't,* 489 U.S. 189, 195-96, 109 S.Ct. 998, 103 L.Ed.2d 249 (1989)). But this principle does not apply once the Government takes custody of the citizen and deprives him of his liberty.

> [Our cases] stand only for the proposition that when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being. . . . The affirmative duty to protect arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf.

Id. at 280-81 (alteration in original) (quoting *DeShaney,* 489 U.S. at 199-200, 109 S.Ct. 998). The Dissent cites *Grindle* in support of its claim that an affirmative act is required, and he is correct that

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[8] The elements of a properly pleaded state-created-danger claim are: "(1) the harm ultimately caused to the plaintiff was foreseeable and fairly direct; (2) the state-actor acted in willful disregard for the plaintiff's safety; (3) there was some relationship between the state and the plaintiff; and (4) the state-actor used his authority to create an opportunity for danger that otherwise would not have existed." *Phillips,* 515 F.3d at 235.

this case upheld a supervisory liability claim for substantive due process deliberate indifference that was predicated upon an official's attempt to "conceal[ ] reports of abuse and creat[e] an atmosphere that allowed abuse to flourish." 599 F.3d at 590. Certainly, an affirmative act such as concealment of wrongdoing could satisfy the deliberate indifference standard, but it is not necessary. Under the Eighth Amendment, prison officials, from the bottom up, may be liable if by act or omission they display a deliberate indifference to a known risk of substantial harm to an inmate's health or safety. *Farmer,* 511 U.S. at 843, 114 S.Ct. 1970. The omission alleged here is the deliberately indifferent failure to enforce FCM's compliance with proper suicide-prevention protocols, as required under FCM's contract with the DOC. As we will discuss, there is a material factual dispute on this point.

ii.

The Dissent would require both that the supervisor "personally display[ed] deliberate indifference," Dis. Op. at 340 (internal citation and quotation marks omitted), and that the supervisor was "personal[ly] involve[d] in his subordinates' misfeasance," *id.* at 336. With respect to the former observation, we agree, which is why our decision requires subjective deliberate indifference on the part of the offending officer. *See* Part III.A.1, *supra.* With respect to the latter, the Dissent misinterprets the rules for Eighth Amendment liability under *Farmer.*

The Dissent asserts that, by affirming *Sample's* vitality post-*Iqbal,* our decision wrongly applies an *objective,* rather than a *subjective,* test for evaluating deliberate indifference, in contravention of *Farmer.* This criticism is unpersuasive for two reasons. First, the premise upon which the Dissent's argument

rests—that "*Sample*'s objective quality is patent," *see* Dis. Op. at 341—is far from clear. *Sample* expressly constructed its test for deliberate indifference around *what* the officer knew and *how* the officer reacted to that knowledge. *Sample*, 885 F.2d at 1118 (asking whether the officer "*was aware* that this unreasonable risk existed" and whether that officer "*was indifferent* to that risk" (emphasis added)). This is clearly a subjective test as required by *Farmer*, a conclusion bolstered by our recitation of the *Sample* test in *Brown*, a case that post-dates *Farmer* and yet approves *Sample*. *See Brown*, 269 F.3d at 216. Far from being patently objective, *Sample*'s test is explicitly concerned with the officer's subjective knowledge.

The origin of the Dissent's discontent may be *Sample*'s reference to *City of Canton v. Harris*, 489 U.S. 378, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989). In *City of Canton*, the Supreme Court held that a municipality "can be liable for failure to train its employees when the municipality's failure shows 'a deliberate indifference to the rights of its inhabitants.'" *Farmer*, 511 U.S. at 840, 114 S.Ct. 1970 (quoting *City of Canton*, 489 U.S. at 389, 109 S.Ct. 1197). In *Farmer*, the Court stated that *City of Canton*, which allowed liability to attach based on "obviousness or constructive notice," created an objective test for deliberate indifference that was inappropriate in the Eighth Amendment context. *Farmer*, 511 U.S. at 841, 114 S.Ct. 1970. To be sure, *Sample* stated that it derived its test "[b]ased on *City of Canton*," 885 F.2d at 1118, but the *actual* test that it articulated clearly sounds in subjectivity.

The Dissent cites a passage of *Sample* in which we said that "there are situations in which the risk of

constitutionally cognizable harm is so great and so obvious that the risk and the failure of supervisory officials to respond will alone support findings of the existence of an unreasonable risk, of knowledge of that unreasonable risk, and of indifference to it." 885 F.2d at 1118; Dis. Op. at 342. In fairness to our colleague, one could read this as suggesting that an objective test *might* be applicable in situations where evidence of the officer's knowledge and intent was absent. But one could also read this statement as recognizing that the requisite mental state can be proved by circumstantial evidence. *Cf. Farmer,* 511 U.S. at 842, 114 S.Ct. 1970 ("Whether a prison official had the requisite knowledge of a substantial risk is a question of fact subject to demonstration in the usual ways, including inference from circumstantial evidence, and a fact-finder *may conclude* that a prison official knew of a substantial risk from the very fact that the risk was obvious." (emphasis added)).

At any rate, this brings us to the second reason that the Dissent's objection fails: the test that *we* derive from *Sample* and apply in this case cannot be described as anything but subjective, and is thus entirely consistent with *Farmer.* Moreover, the Dissent's statement that the District Court has already determined that "'a reasonable factfinder could not determine that Defendants were deliberately indifferent to the risk of suicide,'" Dis. Op. at 341 (quoting JA at 15), is a red herring because that determination was made in reference to Count I of the third amended complaint, which alleged that Appellants were deliberately indifferent to Barkes's serious medical needs as an individual. That is a very different claim than the supervisory liability claim contained in Count V and that we are allowing to proceed. To the extent that *Sample* approved, in

some circumstances, an objective test for determining a prison official's Eighth Amendment deliberate indifference, that portion of *Sample* has been abrogated by *Farmer* and it is not the test we apply today.

Recognizing that our test does, in fact, require an official's subjective deliberate indifference, the Dissent pivots and claims that the plaintiff must nonetheless plead that the supervisor was "personal[ly] involve[d] in his subordinates' misfeasance." Dis. Op. at 336. The Dissent's rule would have the practical effect of requiring that a supervisor have personal knowledge of an individual inmate, that inmate's particular serious medical need, and of the prison staff's failure to treat that need, before the supervisor could ever be held liable for deliberate indifference. But *Farmer* itself recognized that a prison official cannot avoid liability under the Eighth Amendment simply "by showing that, while he was aware of an obvious, substantial risk to inmate safety, he did not know that the complainant was especially likely to" suffer a constitutional injury. 511 U.S. at 843, 114 S.Ct. 1970.

> The question under the Eighth Amendment is whether prison officials, acting with deliberate indifference, exposed a prisoner to a sufficiently substantial "risk of serious damage to his future health," and it does not matter whether the risk comes from a single source or multiple sources, any more than it matters whether a prisoner faces an excessive risk of attack for reasons personal to him or because all prisoners in his situation face such a risk. If, for example, prison officials were aware that inmate "rape was so common and uncontrolled that some potential victims dared not sleep [but] instead . . . would leave their beds and spend the night clinging to the bars nearest

> the guards' station," it would obviously be irrelevant to liability that the officials could not guess beforehand precisely who would attack whom.

Id. at 843-44, 114 S.Ct. 1970 (internal citations omitted) (quoting *Helling v. McKinney*, 509 U.S. 25, 33, 35, 113 S.Ct. 2475, 125 L.Ed.2d 22 (1993); *Hutto v. Finney*, 437 U.S. 678, 681-82 n. 3, 98 S.Ct. 2565, 57 L.Ed.2d 522 (1978)). A high-ranking prison official can expose an inmate to danger by failing to correct serious known deficiencies in the provision of medical care to the inmate population. That the official had no specific knowledge of any particular inmate or the failure of subordinate officials to treat that inmate's serious medical condition is irrelevant.

The Dissent suggests that *Nelson v. Correctional Medical Services*, 583 F.3d 522 (8th Cir.2009) (en banc), contradicts our analysis, but in fact that case supports our position. There, an inmate sued a guard and a prison director under the Eighth Amendment because her legs had been shackled during labor, causing her injury. *Id.* at 525-27. She alleged that the prison director had violated her rights "by failing to ensure that proper policies and customs were implemented with respect to the restraint of female inmates in labor." *Id.* at 534-35. The Eighth Circuit stated that the director could be liable "if he personally displayed deliberate indifference to the hazards and pain resulting from shackling an inmate *such as* [*the plaintiff*] during the final stages of labor."[9] *Id.*

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[9] Contrary to the Dissent's implication, *see* Dis. Op. at 337, the prison director's lack of personal knowledge of the plaintiff and his absence at her delivery were merely undisputed facts in the case. *Nelson*, 583 F.3d at 535. No part of the court's analysis turned on these facts.

(emphasis added) (citing *Farmer*, 511 U.S. at 842, 114 S.Ct. 1970). The court then engaged in a lengthy analysis of the policies and procedures in place at the time, and concluded that they "suggest[ed] administrative concern for the health and safety of pregnant inmates." *Id.* at 536. Under the Eighth Circuit's analysis, the outcome would have been different had the policies and procedures in place been constitutionally inadequate and had there been evidence of the prison director's deliberate indifference to that fact. *Nelson's* analysis also suggests that the director could have been held liable if, notwithstanding the adequacy of the policies, he had been deliberately indifferent to a widespread failure to properly *implement* the policies. *See id.* at 536 (recognizing the adequacy of the policies and stating that "[w]ithout *further allegation or evidence of deliberate indifference,*" the Eighth Amendment claim must fail (emphasis added)). The latter situation is analogous to that before us today.

What the Dissent fundamentally fails to recognize is that there are different ways that prison officials can be responsible for causing an inmate harm. Dissenting in *Vance,* Judge Hamilton adroitly provided the following hypothetical:

> "[S]uppose . . . that a local police chief or even the FBI director issued a policy that authorized the use of deadly force against any fleeing subject. The policy itself would be unconstitutional under *Tennessee v. Garner* [, 471 U.S. 1, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985)]. The chief or director who authorized that unconstitutional use of force could certainly be held personally responsible under section 1983 or *Bivens* to a person shot by an officer following the policy.

Vance, 701 F.3d at 223 (Hamilton, J., dissenting). No less here, where there is evidence of serious inadequacies in the provision of adequate medical care for inmates, and there is evidence that prison officials were aware of the problem and yet indifferent to the risk that an inmate would suffer a constitutional injury, they can be held liable under § 1983 for violating the Eighth Amendment

iii.

Our final point of disagreement with the Dissent is in his articulation of the deliberate indifference standard itself. The Dissent claims that we err in failing to apply an "intentional version of deliberate indifference." Dis. Op. at 340. But his formulation of deliberate indifference is entirely inconsistent with Supreme Court precedent.

We derive the test for establishing Eighth Amendment deliberate indifference from *Sample* and from the Supreme Court's decision in *Farmer*. While the Dissent is correct that Appellees do not allege that Appellants took an intentional act to cause inadequate medical care for inmates, this is a straw-man argument because under *Farmer* they are not *required* to make that allegation. *Farmer* stated that although "deliberate indifference entails something more than mere negligence, the cases are also clear that it is satisfied by something less than acts or omissions for the very purpose of causing harm or with knowledge that harm will result." 511 U.S. at 835, 114 S.Ct. 1970. Deliberate indifference falls "somewhere between the poles of negligence at one end and purpose or knowledge at the other." *Id.* at 836, 114 S.Ct. 1970. "[A]n Eighth Amendment claimant need not show that a prison official acted or failed to act believing that harm actually would befall an inmate; it is enough

that the official acted or failed to act despite his knowledge of a substantial risk of serious harm." As we will discuss *infra*, there remains a genuine dispute of material fact over whether Appellants displayed deliberate indifference under this standard.[10]

B.

"Qualified immunity shields government officials from civil damages liability unless the official violated a statutory or constitutional right that was clearly established at the time of the challenged conduct." *Reichle v. Howards*, ____ U.S. ____, 132 S.Ct. 2088, 2093, 182 L.Ed.2d 985 (2012). The qualified immunity analysis is thus composed of two constituent questions: first, whether the plaintiff suffered a deprivation of a constitutional or statutory right; and second, if so, whether that right was "clearly established" at the time of the alleged misconduct. If the answer to either question is "no," qualified immunity applies. *Id.* Deciding which question to address first is within the Court's sound discretion. *Pearson v.*

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[10] The Dissent draws its "intentional" deliberate indifference test from *Vance*. *Vance* stated, in discussing supervisory liability post-*Iqbal*, that "[d]eliberate indifference to a known risk is a form of intent," but that in order "to show *scienter* by the deliberate-indifference route, a plaintiff must demonstrate that the public official knew of risks with sufficient specificity to allow an inference that inaction is designed to produce or allow harm." 701 F.3d at 204. We think *Vance* is distinguishable because that case did not consider an Eighth Amendment claim. Before reaching the question of supervisory liability, the Seventh Circuit considered whether it would recognize a new *Bivens* remedy against military personnel who mistreat detainees in violation of the Detainee Treatment Act, 10 U.S.C. § 801 note and 42 U.S.C. §§ 2000dd to 2000dd-1, and potentially one or more treaties. 701 F.3d at 198. The allegation involved violation of a federal statutory right rather than the Eighth Amendment, and so the mental state need not have matched that which we apply today.

Callahan, 555 U.S. 223, 236, 129 S.Ct. 808, 172 L.Ed.2d 565 (2009).

1.

A right is "clearly established" if, at the time of the alleged deprivation, "'[t]he contours of [the] right [are] sufficiently clear' that every 'reasonable official would have understood that what he is doing violates that right.'" *al-Kidd*, 131 S.Ct. at 2083 (second alteration in original) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987)). Crucial to the "clearly established" inquiry is the level of generality at which the right is defined. A constitutional right is not "clearly established simply because of the existence of a broad imperative like the one against 'unreasonable . . . seizures,'" *Schneyder v. Smith*, 653 F.3d 313, 329 (3d Cir.2011), but nor must there be "a case directly on point [if] existing precedent . . . [has] placed the statutory or constitutional question beyond debate," *al-Kidd*, 131 S.Ct. at 2083 (citing *Anderson*, 483 U.S. at 640, 107 S.Ct. 3034). Rather, the asserted right must be sufficiently bounded that it gives "practical guidance" to officials on the ground. *See* John C. Jeffries, Jr., *What's Wrong with Qualified Immunity?*, 62 Fla. L.Rev. 851, 854 (2010). Put another way, the right asserted cannot be so abstract that *any* transgression violates a clearly established right, thereby evaporating "the balance. . . between the interests in vindication of citizens' constitutional rights and in public officials' effective performance of their duties." *Anderson*, 483 U.S. at 639, 107 S.Ct. 3034 (internal quotation marks omitted) (quoting *Davis v. Scherer*, 468 U.S. 183, 195, 104 S.Ct. 3012, 82 L.Ed.2d 139 (1984)). The "ultimate question" in the qualified immunity analysis "is whether the defendant had "'fair warning' that his conduct deprived his victim of a constitutional right.'"

Schneyder, 653 F.3d at 329 (quoting *Hope v. Pelzer,* 536 U.S. 730, 740, 122 S.Ct. 2508, 153 L.Ed.2d 666 (2002)).

The "clearly established" game is won or lost on how broadly or narrowly one defines the right at issue. Appellants attempt to atomize the asserted right into oblivion by defining it narrowly as an inmate's right to "supervision of the medical vendor by the prison administrators," for which they assert that "[t]here is no case law establishing that a government entity is responsible for monitoring a medical provider under Section 1983." Appellants' Br. at 19. There are two problems with this characterization. First, its myopia runs directly contrary to the Supreme Court's oft-repeated admonition that "a case directly on point" is not required for a right to be clearly established. *See al-Kidd,* 131 S.Ct. at 2083. Second, this argument hinges entirely on the outsourcing of prison medical care to a private, third-party provider. Appellants do not argue that they have no responsibility to supervise state-employed correctional staff such as guards, or that they *would* have no responsibility to supervise the medical staff were it composed of state employees rather than private contractors. Rather, their argument depends entirely on the Court finding that there is a difference of constitutional import between the two. No reasonable prison administrator could believe that hiring a private contractor to provide a constitutionally required service would allow them to abdicate their constitutional supervisory duties. Yet, culled to its essence, that is Appellants' argument.

Even if we were to accept the manner in which Appellants would particularize the asserted right, they have nonetheless failed to show a lack of clarity in the law. They rely on our decision in *Spruill v.*

Gillis, in which an inmate in a Pennsylvania prison brought a § 1983 claim against, among other individuals, the Unit Manager of the Restricted Housing Unit, alleging that as a result of his deliberate indifference the plaintiff was injured by an untreated or inadequately treated back problem. 372 F.3d 218, 222 (3d Cir.2004). In affirming dismissal of the complaint against the non-medical official for failure to state a claim, we held:

> If a prisoner is under the care of medical experts. . ., a non-medical prison official will generally be justified in believing that the prisoner is in capable hands. This follows naturally from the division of labor within a prison. Inmate health and safety is promoted by dividing responsibility for various aspects of inmate life among guards, administrators, physicians, and so on. Holding a non-medical prison official liable in a case where a prisoner was under a physician's care would strain this division of labor. Moreover, under such a regime, nonmedical officials could even have a perverse incentive *not* to delegate treatment responsibility to the very physicians most likely to be able to help prisoners, for fear of vicarious liability.

Id. at 236.

Appellants rely on this language to argue that, at the time of Barkes's suicide, it was not clearly established that they, as non-medical prison administrators, had a constitutional supervisory duty over the medical staff. But in the very next line of *Spruill* we stated that "absent a reason to believe (or actual knowledge) that prison doctors or their assistants are mistreating (or not treating) a prisoner, a non-medical prison official . . . will not be chargeable with the

Eighth Amendment scienter requirement of deliberate indifference." *Id.* Dismissal was proper in *Spruill* because the plaintiff had failed to plead facts suggesting that the official was aware of the alleged inadequacies in medical care, not because prison administrators are categorically exempt from a supervisory role over medical personnel. *Id.* at 236-37 & n. 12. And moreover, there is nothing in *Spruill* supporting Appellants' contention that there is a difference of constitutional import between state-employed and privately contracted medical staff. Appellants' argument that the law was hazy with respect to their supervisory duty over prison medical staff is thus belied by the very case upon which they rely. *See* Appellants' Br. at 20 (conceding that *Spruill* was "[t]he clearly established" law at the pertinent time).[11]

With that said, we think that the right Appellees assert, properly defined, is this: an incarcerated person's right to the proper implementation of adequate suicide prevention protocols.[12] This right is clearly established in our case law, and was so at the time of Barkes's suicide. It is beyond dispute that the cruel and unusual punishments clause of the Eighth

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[11] The Dissent asserts that we have not "address[ed] Taylor and Williams's argument that there is no clearly established right to supervision over those charged with implementing suicide prevention protocols." Dis. Op. at 342-43. This is a puzzling disagreement because, as previously demonstrated, we have discussed and rejected their attempt to characterize the right in such a manner, and noted that, even were we to accept it, *Spruill* forecloses their argument.

[12] The District Court defined the pertinent right as Barkes's "constitutional right to adequate medical care." JA at 21. While we agree with the District Court's ultimate ruling on qualified immunity, we think that this characterization fails to sufficiently particularize the asserted right.

Amendment, incorporated by virtue of the Fourteenth, obliges the States to provide adequate medical care for the incarcerated. *See Estelle,* 429 U.S. at 104, 97 S.Ct. 285. This is so because "[p]risoners retain the essence of human dignity inherent in all persons." *Brown v. Plata,* _____ U.S. _____, 131 S.Ct. 1910, 1928, 179 L.Ed.2d 969 (2011). Prisoners, because of their incarceration, have lost the means to provide for themselves, and therefore the prisons that house them are constitutionally bound to provide sustenance and adequate physical and mental health care. *Id.*

At the time of Barkes's suicide, we had long recognized that an inmate's "particular vulnerability to suicide" is a serious medical need that prison officials may not recklessly disregard. *Colburn v. Upper Darby Twp.,* 838 F.2d 663, 669 (3d Cir.1988) (*Colburn I*), *abrogated on other grounds by Leatherman v. Tarrant Cnty. Narcotics Intelligence and Coordination Unit,* 507 U.S. 163, 113 S.Ct. 1160, 122 L.Ed.2d 517 (1993). In *Colburn I,* we examined for the first time whether a prisoner's suicide can give rise to liability under § 1983. We began by examining cases in which the plaintiff was the victim of violence by persons other than the defendant-officials, and drew from that precedent the conclusion that "where prison officials infringed a liberty interest by intentional conduct, gross negligence, or reckless indifference, or an established state procedure, the matter is actionable under section 1983." *Id.* at 667-68 (citing *Commonwealth Bank & Trust Co. v. Russell,* 825 F.2d 12 (3d Cir.1987); *Davidson v. O'Lone,* 752 F.2d 817 (3d Cir.1984) (en banc), *aff'd sub nom. Davidson v. Cannon,* 474 U.S. 344, 106 S.Ct. 668, 88 L.Ed.2d 677 (1986)). We saw "no reason not to apply a similar construction of section 1983 when the acts causing the injury are those of the prisoner herself." *Id.* at 668.

We drew additional guidance from the Supreme Court's decision in *Hudson v. Palmer,* 468 U.S. 517, 104 S.Ct. 3194, 82 L.Ed.2d 393 (1984). *See Colburn I,* 838 F.2d at 668-69. In *Hudson,* the Supreme Court approved of searches of inmates and their cells to discover contraband in order to not only prevent violence against correctional staff and other prisoners but also to prevent suicides. *Hudson,* 468 U.S. at 526, 104 S.Ct. 3194 (recognizing that suicide was a significant concern in correctional institutions). Finding particular significance in "the [*Hudson*] Court's statement that prison administrators 'are under an obligation to take reasonable measures to guarantee the safety of the inmates themselves,'" *Colburn I,* 838 F.2d at 668 (quoting *Hudson,* 468 U.S. at 526, 104 S.Ct. 3194), we held that when custodial officials "know or should know of the particular vulnerability to suicide of an inmate, then the Fourteenth Amendment imposes on them an obligation not to act with reckless indifference to that vulnerability," *id.* at 669.[13]

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[13] We also relied on the Fifth Circuit's decision in *Partridge v. Two Unknown Police Officers,* 791 F.2d 1182 (5th Cir.1986). *Partridge* was one of the first cases to extend the analysis of *Estelle* to prison suicide cases. Writing for the Court, Judge Wisdom observed:

> [The due process clause imposed on the custodial officials] a duty, at a minimum, not to be deliberately indifferent to Partridge's serious medical needs. A serious medical need may exist for psychological or psychiatric treatment, just as it may exist for physical ills. A psychological or psychiatric condition can be as serious as any physical pathology or injury, especially when it results in suicidal tendencies. And just as a failure to act to save a detainee from suffering from gangrene might violate the duty to provide reasonable medical care absent an intervening legitimate government

We further elucidated this issue in *Colburn v. Upper Darby Township,* 946 F.2d 1017 (3d Cir.1991) (*Colburn II*). In *Colburn II,* we explained that one of the principal "theoretical underpinnings" in *Colburn I* was the Supreme Court's ruling in *Estelle,* which established that prison administrators "violate the Eighth Amendment's proscription of cruel and unusual punishment when they exhibit 'deliberate indifference to serious medical needs of prisoners.'" *Id.* at 1023 (quoting *Estelle,* 429 U.S. at 104, 97 S.Ct. 285). We reemphasized in *Colburn II* that a "particular vulnerability to suicide" is a serious medical need encompassed within the rule of *Estelle. Id.* (citing *Monmouth Cnty. Corr. Inst. Inmates v. Lanzaro,* 834 F.2d 326 (3d Cir.1987)).[14]

This body of precedent places it "beyond debate," *al-Kidd,* 131 S.Ct. at 2083, that appropriate suicide-preventive measures are a required component of

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objective, failure to take any steps to save a suicidal detainee from injuring himself may also constitute a due process violation. . . .

Id. at 1187 (quoted in *Colburn I,* 838 F.2d at 669).

[14] We note that the District Court cited *Woloszyn v. County of Lawrence,* 396 F.3d 314, 319 (3d Cir.2005), in support of its holding that Barkes had alleged the violation of a clearly established right. *See* JA at 19 n. 5. We reiterated in *Woloszyn* that a vulnerability to suicide is a serious medical need. 396 F.3d at 319-20. However, *Woloszyn* post-dates Barkes' 2004 death, and accordingly is not relevant for purposes of determining the state of the law at the pertinent time. *See Leveto v. Lapina,* 258 F.3d 156, 162 (3d Cir.2001) ("'[I]n the light of pre-existing law the unlawfulness must be apparent'" (quoting *Anderson,* 483 U.S. at 640, 107 S.Ct. 3034)). Nonetheless, as we discuss above, our decisional law in place at the time of Barkes' death suffices to meet the clearly established inquiry.

the Constitution's command that prison administrators provide adequate mental and physical health care for inmates. Our decision in *Spruill* gives "fair warning," *Schneyder*, 653 F.3d at 329, that non-medical prison officials may "be chargeable with the Eighth Amendment scienter requirement of deliberate indifference" when they possess actual knowledge or have reason to believe that prison medical staff are mistreating or failing to treat inmates' serious medical conditions. *Spruill*, 372 F.3d at 236. Accordingly, we hold that the right Appellees assert—an incarcerated person's right to the proper implementation of adequate suicide prevention protocols—was clearly established at the time of Barkes's suicide.[15]

2.

The first prong of the qualified immunity analysis (though we address it second here) asks whether the plaintiff suffered a deprivation of a constitutional or statutory right. A finding of qualified immunity grants immunity not only from liability, but from the burdens of litigation itself. We have recognized that "'the determination of qualified immunity must be made at an early stage in the litigation'"—often in a pre-answer motion to dismiss. *See Ball v. Famiglio*,

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[15] The Dissent makes one final objection to this analysis, claiming that by defining the right to include the "proper implementation" of suicide prevention protocols we have "plainly violate[d] the basic proposition that the Eighth Amendment does not impose liability for negligence." Dis. Op. at 345. We have not. Nothing in our definition of the right at issue—or in our opinion more broadly—remotely suggests that a mere negligent failure to properly implement suicide prevention protocols would be sufficient to trigger liability. A *recklessly indifferent* failure to properly implement such protocols, however, may very well trigger Eighth Amendment liability.

726 F.3d 448, 461 (3d Cir.2013) (quoting *Vaughn v. U.S. Small Bus. Admin.*, 65 F.3d 1322, 1326 (6th Cir.1995)). We thus often analyze qualified immunity without the benefit of a factual record. However, in this case Appellants asserted qualified immunity in a motion for summary judgment. While "[t]he issue of qualified immunity is generally a question of law, . . . a genuine issue of material fact will preclude summary judgment on qualified immunity." *Giles*, 571 F.3d at 326 (citing *Deary v. Three Un-Named Police Officers*, 746 F.2d 185, 192 (3d Cir.1984)). Based upon our review of the summary judgment record, we find that there exist genuine disputes of material fact that preclude a finding of qualified immunity for Appellants.

As we noted previously, *Sample*'s four-part test provides the rubric for evaluating whether supervisors are liable under § 1983 for deliberate indifference. *See Whetzel*, 256 F.3d at 134-35. To hold a supervisor liable for such an Eighth Amendment violation, the plaintiff must identify a supervisory policy or procedure that the supervisor defendant failed to implement, and prove that: (1) the policy or procedures in effect at the time of the alleged injury created an unreasonable risk of a constitutional violation; (2) the defendant-official was aware that the policy created an unreasonable risk; (3) the defendant was indifferent to that risk; and (4) the constitutional injury was caused by the failure to implement the supervisory procedure. *Brown*, 269 F.3d at 216 (discussing *Sample*). The District Court found that disputed factual issues existed as to each of these four elements. We agree with its analysis.

Appellees claim that Taylor and Williams should have enforced FCM's compliance with their contractual obligations, specifically by requiring FCM to adhere to up-to-date NCCHC standards, by properly administering the standards to which they adhered, and by requiring mental health screenings to have been conducted by a qualified mental health professional rather than an unqualified LPN, thus satisfying *Sample*'s threshold requirement.[16] Record evidence indicates a material factual dispute as to whether FCM's suicide prevention procedures, coupled with DOC's supervision of FCM (or lack thereof), created an unreasonable risk of a constitutional violation. First, there is evidence that FCM's suicide prevention

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[16] In Count V of the third amended complaint, Appellees alleged that Taylor and Williams "failed to supervise and/or monitor the activities of FCM . . . including, but not limited to, the failure to insure the proper evaluation of [Barkes's] psychological condition in light of his responses to intake inquiries advising of his prior suicide attempt, and the failure to insure that appropriate suicide-prevention observation of and/or restrictions upon Mr. Barkes occurred in the period prior to an evaluation by a fully qualified medical provider." JA at 170. They further alleged that "the intake form filled out by Mr. Barkes indicated a previous suicide attempt in December of 2003, and the presence of psychological problems and indications of his usage of psychotropic medication, yet he was not placed under heightened surveillance," and that "the intake form, after having been filled out by Mr. Barkes, was reviewed only by an FCM licensed practical nurse prior to the assignment of Mr. Barkes to a virtually unsupervised booking and receiving area," and that "the intake form on which so much reliance was placed by the DOC and FCM had been removed by the NCCHC from its 2003 'Standards for Health Services in Prisons' because the NCCHC had found that prison administrators were relying too heavily on such forms instead of implementing the procedures described and recommended in the text of the 'Standards for Health Services in Prisons.'" JA at 171.

screening practices were not in compliance with NCCHC standards, as required by their contract with the DOC, insofar as FCM was relying on out-of-date NCCHC guidelines and failed even to properly implement the standards upon which it was relying. Specifically, the intake form administered to Barkes was designed to be used by a qualified mental health professional, but instead was administered by an unqualified LPN. Appellees claim that, had the proper procedures been followed, Barkes's answer regarding a previous suicide attempt and his use of certain medications would have triggered a referral to a mental health professional. While the NCCHC apparently accredited HRYCI about one year before Barkes's death, that is simply one fact among many that the factfinder will have to consider. Second, the evidence also suggests that FCM lacked access to Barkes's probation records, and that if they had such access they would have been aware of his lengthy history of mental health problems and suicide attempts, and may have placed Barkes under heightened suicide prevention measures. Third, there is evidence that FCM was intentionally short-staffing to drive up profits. Fourth, evidence suggests that DOC's dilatory manner of supervision allowed FCM's provision of services to degrade. Joyce Talley, the DOC official tasked with ensuring FCM's compliance with the contract, did not assess FCM's provision of medical care to the inmates,[17] claimed that it was not

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[17] *See, e.g.*, JA at 367 ("Q: Did you make any assessments of the job they [FCM] were doing providing medical care for the inmates? A: I personally did not, no."); *id.* ("Going back to my question regarding the assessment of the services provided by the independent vendor FCM, was there anyone from the Department of Correction who made any such assessment? A: There was no one that had the knowledge or the background within the

her responsibility to ensure FCM's compliance with NCCHC standards, and stated that she largely relied on FCM to police itself.[18] Based on the record before us, a reasonable jury could find that FCM's policies and procedures in place at the time of Barkes's suicide created an unreasonable risk of a constitutional deprivation and that Appellants' manner of supervising FCM further exacerbated the risk.

Appellants stated in deposition testimony that they knew that the quality of FCM's provision of medical services was degrading, with both Appellants acknowledging awareness of intentional short-staffing and Williams acknowledging awareness of FCM's contractual noncompliance with respect to implementing the document management computer system. Taylor's termination letter to FCM indicates his awareness of FCM's gross contractual non-compliance. A reasonable juror could draw from that evidence the conclusion that Appellants were aware of an unreasonable risk that FCM's declining performance would result in a failure to treat or a mistreatment of an inmate's serious medical condition. A reasonable juror could also conclude that, by failing to enforce FCM's compliance with NCCHC standards as required by their contract, Appellants were deliberately indifferent to the risk that FCM's flagging quality would result in a violation of an inmate's constitutional rights.

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department that could actually go out to see if the medical care was provided.").

[18] *See* JA at 366-67 ("Q: As in the other responsibilities, did you have any type of key managers? A: Within the medical? Q: Yes. A: No. It was—no. Q: How is it that you managed the health care issues for inmates? A: That would be working with the contracted vendor and through the MRC, the Medical Review Committee.").

Finally, a reasonable juror could find that Barkes's suicide was caused by Appellants' failures to supervise. Despite Barkes's extensive history of mental health problems and multiple suicide attempts (including one at the very prison where he was being held, and two a mere 65 days before his death), the LPN who performed his intake did not place him on even the lowest level of suicide watch. In Appellees' view, had Appellants properly supervised FCM and ensured compliance with the contract, Barkes's answers during his screening would have resulted in additional preventive measures being taken. Of course, it is also true that Barkes did not self-report feelings of suicidal ideation, nor did he exhibit any outward signs of suicidality. But this serves only to highlight the factual nature of this dispute, which neither we nor the District Court on summary judgment are in the position to resolve.

Based on our review of the summary judgment record, we conclude that there remain sufficient factual disputes to preclude a finding that Appellants are entitled to qualified immunity.

IV.

For the reasons that we have discussed, Appellants are not entitled to qualified immunity. Accordingly, we will affirm the District Court's order and remand for trial.

HARDIMAN, *Circuit Judge*.

Today the Court holds that two of the most senior executives in the Delaware prison system must stand trial for the suicide of Christopher Barkes. In my view, this decision is a classic case of holding supervisors vicariously liable, a practice the Supreme Court proscribed in *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009). The majority accomplishes this feat by attempting to salvage the supervisory liability doctrine we created twenty years before *Iqbal* in *Sample v. Diecks*, 885 F.2d 1099 (3d Cir.1989). As I shall explain, *Sample* has been abrogated by *Iqbal*. And even assuming I am wrong about *Sample*'s abrogation, Defendants Taylor and Williams are still entitled to summary judgment because Barkes has not complied with *Sample*'s requirement that she identify a specific supervisory practice or procedure that they failed to employ. I respectfully dissent.

I

Christopher Barkes arrived at the HRYCI around 2:45 p.m. on Saturday, November 13, 2004, following his arrest by Wilmington Police for a probation violation. Normally, Barkes would have been taken promptly to the Violation of Probation Center in Sussex County. Because it was the weekend, however, the HRYCI held him as a courtesy because the DOC's transportation department ran only on weekdays. The HRYCI booked and processed Barkes as it would any other inmate, but did not admit him; rather, it held him in the booking and receiving area.

As part of Barkes's intake, the DOC's medical services contractor, First Correctional Medical, Inc. (FCM), conducted a standard medical screening. In

doing so, FCM gathered Barkes's medical history and checked his vitals and physical health. FCM also administered a mental health screening intended to, *inter alia,* prevent suicides. FCM's suicide prevention screening test listed seventeen risk factors. Some of those factors automatically triggered suicide protection measures. For example, if an inmate appeared to be under the influence of alcohol or drugs and showed signs of withdrawal or mental illness, FCM would immediately initiate its suicide-prevention protocols and notify a physician. Otherwise, FCM initiated its protocols if the inmate's screening noted eight or more of the seventeen risk factors.[1]

A licensed practical nurse employed by FCM conducted Barkes's medical screening about fifteen minutes after his arrival. At that time, he did not appear depressed, anxious, afraid, or angry, and the arresting officers did not believe Barkes was a suicide risk. Barkes told the nurse that he was not thinking about killing himself. Barkes did admit to a prior suicide attempt in 2003, but he failed to disclose three other suicide attempts, one of which was just two months prior to his booking at HRYCI. Based on Barkes's responses during the screening, only two of the seventeen suicide risk factors were indicated: a psychiatric history and a suicide attempt.

The HRYCI correctional staff monitored Barkes throughout Saturday night and Sunday morning.

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[1] FCM modeled its suicide prevention screening form on a sample appended to the National Commission on Correctional Health Care's (NCCHC) 1997 standards for prison health services. In 2003, the NCCHC published a new edition of its manual, but FCM continued using its form modeled on the 1997 manual. One year before Barkes's suicide, the NCCHC accredited the HRYCI after reviewing FCM's suicide prevention screening form.

Officers delivered Barkes his breakfast at 8:00 a.m. He was lying awake on his bed when officers observed him at 10:45 a.m., 10:50 a.m., and 11:00 a.m. Sometime between 11:00 a.m. and 11:35 a.m. when they next checked on him, Barkes hanged himself. Officers immediately called FCM staff, who attempted to resuscitate Barkes.

None of the officers watching Barkes noticed anything unusual about him.[2] The only sign that he had been contemplating suicide came in a phone call Barkes made to his wife the night before his death, in which he told her: "I can't live this way anymore." Although Barkes's wife testified that she interpreted this comment as a suicidal threat, she did not advise anyone at the HRYCI of this comment or otherwise alert them that her husband was in distress.

II

The claim at issue—that Barkes was subjected to cruel and unusual punishment in violation of the Eighth Amendment—is premised on the provision of constitutionally inadequate medical care by FCM. Specifically, Barkes challenges the adequacy of the supervision of FCM's medical staff at the HRYCI. Dr. Tammy Kastre, the President and CEO of FCM, supervised FCM's medical staff at all of Delaware's correctional facilities. The DOC's Bureau of Management Services supervised FCM and Dr. Kastre. The head of that bureau, Joyce Talley, was the DOC's

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[2] Those same officers were not blind to inmates who turned suicidal. In fact, earlier on the same morning that Barkes died, they transferred a different inmate to the infirmary for suicide prevention.

liaison to FCM.[3] Talley tasked her deputy chief, Kathy English, with some of the FCM oversight responsibilities. The formal responsibility for oversight over FCM's compliance with its contract lay with the DOC's Medical Review Committee, which Talley chaired and English co-chaired. Every month, the nine-member committee met with around four FCM representatives. The committee reviewed certain performance measures based on NCCHC standards, such as how long it took FCM to administer its health screening after new inmates were admitted. The committee also reviewed random chart audits. If the DOC had any concerns with FCM's services, it raised them in those meetings.

It is important to note that the liability of none of the persons or entities just mentioned is at issue in this appeal. Instead, Barkes seeks to hold two DOC executives liable: Commissioner Stanley Taylor (Talley's supervisor) and HRYCI Warden Raphael Williams (who was outside the chain of supervision over FCM).[4] The parties agree that neither executive

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[3] The majority contends that Talley "testified that she did not believe it to be her responsibility to ensure FCM's compliance with NCCHC standards." Maj. Transcript at 312-13. As Talley explained, she "managed the health care issues for inmates" by "working with the contracted vendor and through the [Medical Review Committee]." App. at 806. Any complaints about medical issues "would be presented to the MRC. It was as a group. We were a committee that would oversee the contract." App. at 806.

[4] FCM's medical staff were not employees of the HRYCI and they did not report to Warden Williams. Williams's "participation in health care" at the HRYCI was limited to "provid[ing] access, space, and security for [FCM's] medical staff." App. at 517. When Barkes's lawyer asked Williams whether he "had any responsibilities for the adequate provision of health care to inmates," he answered, "No. That was through management services. That's where the responsibility lied." App. at 517. Another time,

had any personal knowledge of Barkes before his death. In fact, Warden Williams was on vacation while Barkes was at the HRYCI. Commissioner Taylor was scarcely more involved in supervising FCM than Warden Williams; in fact, Delaware law empowered him to designate someone to administer the state's medical services contract, and he appointed Talley to discharge that duty. *See* Del.Code tit. 11, § 6517(12). The essence of Barkes's claims against Taylor and Williams is that despite the fact that others were responsible for supervising FCM, "the buck stops" at the top.[5]

When Barkes's widow filed this lawsuit[6] in 2006, her complaint included two section 1983 claims against Taylor and Williams: (1) deliberate indifference to the conditions at the HRYCI; and (2) failure to supervise the DOC personnel and failure to institute

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Williams testified: "all those policies were by management services. They were tasked with ensuring that FCM followed through with their contractual obligations. That's strictly through them." App. at 792.

[5] The majority states that "Taylor's termination letter to FCM indicates his awareness of FCM's gross contractual noncompliance," and that "[a] reasonable juror could draw from that evidence the conclusion that Appellants were aware of an unreasonable risk." Maj. Transcript at 331. However, the District Court has already recognized that events occurring after Barkes's death, such as Taylor's 2005 letter terminating the DOC's contract with FCM "cannot be probative of Commissioner Taylor's or Warden William[s]'s awareness *in 2004* of a substantial risk." App. at 83.

[6] Plaintiffs are Barkes's widow, Karen, both in her personal and representative capacity, as well as his two daughters. For ease of reference, I refer to Plaintiffs collectively as "Barkes."

appropriate procedures.[7] United States District Court Judge Joseph Farnan granted Taylor and Williams summary judgment on both claims. Barkes's deliberate indifference claim failed because she had not presented sufficient evidence of knowledge by Taylor and Williams of constitutionally inadequate medical conditions at the HRYCI. Her supervisory liability claim failed as a matter of law because she did not satisfy the threshold requirement for supervisory liability we established in *Sample v. Diecks,* 885 F.2d 1099 (3d Cir.1989), which requires a plaintiff to "identif[y] . . . a specific supervisory practice or procedure that [the supervisor] failed to employ." *Id.* at 1118.

Several months after granting Taylor and Williams summary judgment, the District Court granted Barkes leave to file an amended complaint. The Court dismissed that first amended complaint for reprising the claims dismissed on summary judgment. Barkes filed a second amended complaint, which was dismissed for failure to state a claim.

In 2010, following the retirement of Judge Farnan, Barkes's case was reassigned to the Honorable Leonard Stark. Barkes filed a third amended complaint that again sought to hold Taylor and Williams liable under a theory of supervisory liability. Having already suffered a summary judgment on the claim that Taylor and Williams failed to supervise employees of the DOC, Barkes shifted gears to argue that they failed to supervise *FCM*. Once again, Taylor and Williams sought summary judgment, asserting

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[7] Not relevant to this appeal, the complaint also included a wrongful death claim against Taylor and Williams, upon which they were granted summary judgment.

qualified immunity for the first time. Barkes also filed a motion for summary judgment.

Before deciding the parties' summary judgment motions, Judge Stark addressed Barkes's separate motion to vacate the 2006 summary judgment and revive the Eighth Amendment and supervisory liability claims upon which Taylor and Williams had prevailed in 2006 before Judge Farnan. With respect to Barkes's Eighth Amendment claim, the District Court held:

> Assuming, as Plaintiffs appear to argue, that deliberate indifference . . . can be shown by Defendants' deliberate indifference to the medical needs of prisoners such as Barkes himself . . . the Court nonetheless concludes that nothing alters the prior conclusions: a reasonable factfinder could not determine that Defendants were deliberately indifferent to the risk of suicide.

App. at 15. The District Court also upheld the 2006 summary judgment on Barkes's supervisory liability claim for failure to supervise DOC personnel and failure to institute appropriate suicide prevention policies, concluding: "even assuming that the existing policy created an unreasonable risk of Eighth Amendment injury, there is still not sufficient evidence in the record from which a reasonable factfinder would conclude that Defendants were aware such an unreasonable risk was created and were indifferent to that risk." App. at 16.

After upholding the 2006 summary judgment for want of evidence that Taylor and Williams were aware of and indifferent to an unreasonable risk of suicide, the District Court denied their motion for summary judgment on Barkes's claim that they failed to

supervise FCM. In doing so, as the majority implicitly acknowledges, *see* Maj. Typescript at 317, the District Court erred in its application of *Sample* by failing to require Barkes to "identif[y] . . . a specific supervisory practice or procedure that [the supervisor] failed to employ." *Sample,* 885 F.2d at 1118. That is a significant oversight, as this was the decisive element for Judge Farnan in deciding the earlier supervisory liability claim. Taylor and Williams now appeal that ruling, claiming qualified immunity because Barkes did not allege a legally cognizable supervisory liability claim against them and that such a right was not clearly established.

III

A

I begin with the Supreme Court's decision in *Ashcroft v. Iqbal,* 556 U.S. 662, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009), which altered the legal landscape regarding supervisory liability. Iqbal sued U.S. Attorney General John Ashcroft and F.B.I. Director Robert Mueller, alleging that the conditions of his detention violated his constitutional rights. Iqbal claimed that Ashcroft and Mueller were "liable for knowledge and acquiescence in their subordinates' use of discriminatory criteria to make classification decisions among detainees." *Id.* at 677, 129 S.Ct. 1937 (internal quotation marks deleted). "That is to say, [Iqbal] believe[d] a supervisor's mere knowledge of his subordinate's [unconstitutional] discriminatory purpose amounts to the supervisor's violating the Constitution." *Id.* The Court "reject[ed] [the] argument," ruling that "a plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution." *Id.* at 676-77, 129 S.Ct. 1937. The Court

continued: "In a § 1983 suit or a *Bivens* action—where masters do not answer for the torts of their servants—the term 'supervisory liability' is a misnomer. Absent vicarious liability, each Government official, his or her title notwithstanding, is only liable for his or her own misconduct." *Id.* at 677, 129 S.Ct. 1937.

Since *Iqbal,* supervisory liability claims must spring from "actions" or "misconduct," *Iqbal,* 556 U.S. at 676, 677, 129 S.Ct. 1937; the mere fact that the supervisor occupied a position of authority is insufficient. Accordingly, the overwhelming weight of authority requires plaintiffs to establish the supervisor's personal involvement in his subordinates' misfeasance. *See Vance v. Rumsfeld,* 701 F.3d 193 (7th Cir.2012) (en banc); *Carnaby v. City of Houston,* 636 F.3d 183, 189 (5th Cir.2011); *Porro v. Barnes,* 624 F.3d 1322 (10th Cir.2010); *Nelson v. Corr. Med. Servs.,* 583 F.3d 522 (8th Cir.2009) (en banc). *But see Starr v. Baca,* 652 F.3d 1202 (9th Cir.2011) (upholding failure to supervise claim when supervisor was not personally involved, but bore statutory responsibility for plaintiff's injury). The courts of appeals requiring the supervisor's personal involvement—i.e., the Fifth, Seventh, Eighth, and Tenth Circuits—have upheld supervisory liability claims when the challenged policy originates with the supervisor or he contributes to its unlawfulness. *See, e.g., Dodds v. Richardson,* 614 F.3d 1185, 1190 (10th Cir.2010) (challenging sheriff's accession to unlawful policy of denying bond after hours); *T.E. v. Grindle,* 599 F.3d 583 (7th Cir.2010) (challenging school principal's active concealment of abuse reports). None of those courts of appeals has upheld a so-called "failure-to" claim, in which subordinates violate the law while the supervisor fails to take remedial action.

Decisions of both the Seventh and Tenth Circuits illustrate the fundamental dichotomy between cases involving the supervisors' personal involvement on the one hand and those relying on the supervisor's position of authority. For example, the Seventh Circuit upheld a supervisory liability claim in *T.E. v. Grindle,* 599 F.3d 583 (7th Cir.2010), when the plaintiffs "allege[d] that [the principal was] liable for actively concealing reports of abuse and creating an atmosphere that allowed abuse to flourish. In other words, they argue[d] that [the principal's] *own actions* deprived them of their constitutional right." *Grindle,* 599 F.3d at 590 (emphasis added).[8] Significantly, the plaintiffs' theory did not rely on the "mere failure of supervisory officials to act." *Id.* The allegations survived *Iqbal* "[b]ecause plaintiffs seek to do no more than hold [the principal] liable 'for . . . her own misconduct.'" *Id.* (quoting *Iqbal*).

Two years after *Grindle* was decided, the Seventh Circuit, sitting en banc, confronted a failure-to-supervise claim in *Vance v. Rumsfeld,* 701 F.3d 193 (7th Cir.2012) (en banc). Vance sued Secretary of Defense Donald Rumsfeld, alleging that "[Secretary Rumsfeld] received reports that his subordinates sometimes [unlawfully] used [harsh interrogation] techniques . . . and . . . he did not do enough to bring interrogators under control." *Id.* at 203. The Seventh Circuit recognized that after *Iqbal,* "[t]he supervisor can be liable only if he *wants* the unconstitutional or illegal conduct to occur." *Id.* For Vance's deliberate indifference claim, that meant he "would need to

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[8] Contrary to the majority's view of the case, the *Grindle* plaintiffs alleged much more than that the supervisor-principal "allow[ed] a subordinate teacher to continue working." Maj. Typescript at 319.

allege that Rumsfeld knew of a substantial risk to security contractors' employees, and ignored that risk because he wanted plaintiffs (or similarly situated persons) to be harmed." *Id.* at 204. This was because, absent that showing, supervisory liability claims become claims for vicarious liability. *Id.* "The head of any large bureaucracy receives reports of misconduct. . . . But heads of organizations have never been held liable on the theory that they did not do enough to combat subordinates' misconduct, and the Supreme Court made it clear in *Iqbal* that such theories of liability are unavailing." *Id.* at 204-05. For these reasons, the Seventh Circuit granted Secretary Rumsfeld qualified immunity.[9]

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[9] The majority distinguishes *Vance* on the basis that Secretary Rumsfeld's subordinates violated a federal statute instead of the Eighth Amendment. Although it is true that *Vance* did not involve an Eighth Amendment claim, its analysis on this point relied exclusively on Eighth Amendment case law. It goes without saying that if both a federal statute and the Eighth Amendment embrace the same state of mind, the analysis is identical. The majority and *Vance* both apply *Farmer v. Brennan*, 511 U.S. 825, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994), a fact obscured by the majority's removal of "But *Farmer v. Brennan*, holds that" in quoting *Vance*. See Maj. Typescript at 325 n. 10. *Vance*'s unaltered text explains:

> The supervisor must want the forbidden outcome to occur. Deliberate indifference to a known risk is a form of intent. But *Farmer v. Brennan*, 511 U.S. 825, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994), holds that, to show *scienter* by the deliberate-indifference route, a plaintiff must demonstrate that the public official knew of risks with sufficient specificity to allow an inference that inaction is designed to produce or allow harm.

701 F.3d at 204. One sentence later, the court restated its reliance on *Farmer*:

Like the Seventh Circuit's decision in *Grindle,* the Tenth Circuit's decision in *Dodds v. Richardson,* 614 F.3d 1185 (10th Cir.2010), did not involve a "failure-to" claim. That case involved a sheriff who violated a state law requiring sheriffs to accept bonds for "persons jailed at times other than the normal working hours." *Id.* at 1190. The sheriff acceded to a county clerk's non-binding policy of forbidding persons charged with felonies from posting bond after hours. *Id.* The Tenth Circuit held that *Iqbal* limited section 1983 liability to "defendants *whose own individual actions* cause a constitutional deprivation because it requires plaintiffs prove each defendant *took some act* with the constitutionally applicable state of mind that caused the alleged constitutional violation." *Id.* at 1200 (emphasis added). It upheld the claim because the plaintiff "presented facts that establish personal involvement" by "show[ing] [the sheriff] may have played more than a passive role in the alleged constitutional violation—he may have deliberately enforced or actively maintained the policies in question at the jail." *Id.* at 1204.[10]

> Prisons are dangerous places, and misconduct by both prisoners and guards is common. Liability for wardens would be purely vicarious. *Farmer* rejected a contention that wardens (or guards) can be liable just because they know that violence occurs in prisons and don't do more to prevent it on an institution-wide basis. To get anywhere, [plaintiffs] would need to allege that Rumsfeld knew of a substantial risk to security contractors' employees, and ignored that risk because he wanted plaintiffs (or similarly situated persons) to be harmed.

701 F.3d at 204.

[10] The majority warns that this "rule would have the practical effect of requiring that a supervisor have personal knowledge of an individual inmate, that inmate's particular serious medical

Unlike the direct involvement alleged in *Dodds*, the Tenth Circuit was presented with a failure-to-supervise claim in *Porro v. Barnes*, 624 F.3d 1322 (10th Cir.2010). There, an inmate who was tasered three times by correctional officers brought a supervisory liability action against the county sheriff. *Id.* at 1324-25. The sheriff did not approve the tasering and was not present when it occurred. *Id.* at 1327. Consistent with *Dodds*, the Tenth Circuit held that "[t]o establish a violation of § 1983 by a supervisor, as with everyone else, then, the plaintiff must establish a *deliberate, intentional act* on the part of the defendant to violate the plaintiff's legal rights." *Id.* at 1327-28 (quotations and alterations omitted) (emphasis added); *see also Dodds*, 614 F.3d at 1195 ("[T]he plaintiff must establish a deliberate, intentional act by the supervisor to violate constitutional rights."). The court

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need, and of the prison staff's failure to treat that need," Maj. Transcript at 32. In fact, *Dodds* demonstrates the incorrectness of the majority's supposition because there the "Plaintiff [did] not allege [the Supervisor-]Defendant was one of the jail employees who told him and the individuals who inquired about posting bail on his behalf that he could not post the bail. . . . Nor [did the] Plaintiff contend [the Supervisor-]Defendant personally instructed those employees to refuse to accept bail from [the] Plaintiff." *Dodds*, 614 F.3d at 1194.

Separately, the majority attacks this rule with a hypothetical from Judge Hamilton's dissent from *Vance* in which "a local police chief or even the FBI director issued a policy that authorized the use of deadly force," which policy "would be clearly unconstitutional." Maj. Transcript at 325 (quoting *Vance*, 701 F.3d at 223 (Hamilton, J., dissenting)). This hypothetical clearly survives *Dodds* because the policy's unconstitutional quality originates with the supervisor. Judge Hamilton's hypothetical is poles apart from Barkes's complaint, which alleges FCM's policies—not the DOC's—caused the HRYCI's healthcare to deteriorate below the constitutional minimum.

rejected the claim against the sheriff "because there [was] no evidence of his *direct personal responsibility* for the force used." *Id.* at 1326 (emphasis in original).

Like the Seventh and Tenth Circuits, the Fifth and Eighth Circuits have rejected similar "failure-to" claims after *Iqbal*. In *Nelson v. Correctional Medical Services*, 583 F.3d 522 (8th Cir.2009) (en banc), a prison guard shackled the plaintiff's legs during labor, causing permanent injuries while she gave birth. The plaintiff sued the director of the Arkansas Department of Correction, for "[failure] to ensure that proper policies and customs were implemented with respect to the restraint of female inmates in labor." *Id.* at 527. Sitting en banc, the Eighth Circuit held that under *Iqbal* a supervisor is "liable only if he *personally displayed* deliberate indifference to the hazards and pain resulting from shackling an inmate such as [Plaintiff] during the final stages of labor." *Id.* at 535 (emphasis added).[11] The court confined its analysis to the polices actually promulgated by the Department of Correction under the director's watch, concluding that the policies showed "administrative concern for the health and safety of pregnant inmates." *Id.* at 536.[12]

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[11] The Eighth Circuit reiterated this point in *Whitson v. Stone County Jail*, 602 F.3d 920 (8th Cir.2010), when it stated that prison supervisors can be liable on an Eighth Amendment claim "only if they personally displayed deliberate indifference to the risk" of a constitutional deprivation. *Id.* at 927-28.

[12] Just as *Nelson* approved of the Arkansas Department of Correction's policies expressed in its regulations, we would not hesitate to approve of the Delaware Department of Correction's policy expressed in its contract that requires FCM "to implement 'Best Practices' from State Correctional Services" for mental health care if Barkes challenged the DOC's policies. App. at 138. That analysis is unnecessary, however, because Barkes does not challenge the DOC's policies.

Noting the absence of the commissioner's "personal involvement," the Eighth Circuit granted qualified immunity. *Id.* On this point, the en banc court was unanimous. *Id.* at 536 (Riley, J., concurring in part and dissenting in part). The Fifth Circuit has likewise narrowed supervisory liability to conform to *Iqbal:* "Beyond [the supervisor's] own conduct, the extent of his liability as a supervisor is similar to that of a municipality that implements an unconstitutional policy." *Carnaby v. City of Houston,* 636 F.3d 183, 189 (5th Cir.2011).[13]

The Ninth Circuit's decision in *al-Kidd v. Ashcroft,* 580 F.3d 949 (9th Cir.2009), *overruled on other grounds,* ____ U.S. ____, 131 S.Ct. 2074, 179 L.Ed.2d 1149 (2011), aligns with these authorities. In that case, the government detained the plaintiff under the authority of the federal material witness statute and held him for suspected terrorist activity. The plaintiff brought a supervisory liability action against Attorney General John Ashcroft alleging two violations of the law. First, that Ashcroft "purposefully used the material witness statute" to unlawfully detain persons and that Ashcroft "designed and implemented" this

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[13] The First Circuit's pre-*Iqbal* case law already required "an affirmative link between the behavior of a subordinate and the action or inaction of his supervisor . . . such that the supervisor's conduct led inexorably to the constitutional violation." *Soto-Torres v. Fraticelli,* 654 F.3d 153, 158 (1st Cir.2011) (quoting *Pineda v. Toomey,* 533 F.3d 50, 54 (1st Cir.2008)) (internal quotation marks omitted); *see also Sanchez v. Pereira-Castillo,* 590 F.3d 31, 49 (1st Cir.2009) (quoting *Camilo-Robles v. Zapata,* 175 F.3d 41, 44 (1st Cir.1999)). Whether this standard satisfies *Iqbal* remains a question of first impression for the First Circuit, however. *Soto-Torres,* 654 F.3d at 158 n. 7; *Maldonado v. Fontanes,* 568 F.3d 263, 274 n. 7 (1st Cir.2009).

policy. *Id.* at 957, 976.[14] That claim survived Ashcroft's qualified immunity defense because, "unlike in *Iqbal*, these [were] not bare allegations that the Attorney General 'knew of' the policy. Here, the complaint contain[ed] allegations that plausibly suggest that Ashcroft purposely instructed his subordinates to bypass the plain reading of the statute." *Id.* at 976. The second supervisory liability claim sought to hold Ashcroft liable for subjecting the plaintiff to "unreasonably punitive conditions of confinement" during his detention. *Id.* at 957. The Ninth Circuit granted Ashcroft qualified immunity on this claim because "the complaint [did] not allege any specific facts—such as statements from Ashcroft or from high ranking officials in the DOJ—establishing that Ashcroft had personal involvement in setting the conditions of confinement." *Id.* at 978. Neither claim required the court to decide whether the "knowing failure to act standard" survived *Iqbal*, and it reserved judgment on that question. *Id.* at 976 n. 25.[15]

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[14] The majority reads *al-Kidd* as "suggest[ing] that under *Iqbal* the United States Attorney General could be liable for knowingly 'fail[ing] to act in the light of even unauthorized abuses.'" Maj. Typescript at 318. In fact, the Ninth Circuit took pains to ensure that its decision was not read for that proposition: "We need not address whether [the 'knowing failure to act' standard survived *Iqbal*] because al-Kidd plausibly pleads 'purpose' rather than just 'knowledge' to impose liability on Ashcroft." *al-Kidd v. Ashcroft*, 580 F.3d 949, 976 n. 25 (9th Cir.2009).

[15] Although the *al-Kidd* majority explained that its decision relied on the plaintiff's pleadings of purpose and not a failure to act, Judge Bea perceived otherwise and dissented from the decision on this point, saying "it is doubtful that the majority's knowing failure to act standard survived *Iqbal*." 580 F.3d at 992 n. 13 (Bea, J., dissenting).

When the Ninth Circuit faced a "failure-to" claim in *Starr v. Baca*, 652 F.3d 1202 (9th Cir.2011), it departed from the approaches taken by the Fifth, Seventh, Eighth, and Tenth Circuits. Contrary to the other four courts of appeals, the Ninth Circuit upheld an Eighth Amendment supervisory liability claim against a sheriff "because he knew or should have known about the dangers in the [jail], and . . . was deliberately indifferent to those dangers." *Id.* at 1204-05. The plaintiff's complaint contained detailed allegations concerning the sheriff's knowledge of his subordinates' unlawfulness.[16] In determining the sheriff's culpability for his inaction, however, the Court permitted the claim to go forward because a state statute held the sheriff "answerable for the prisoner's safekeeping." *Id.* at 1208. In a vigorous dissent, Judge Trott claimed that the "complaint has

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[16] It is worth noting that Barkes's allegations of knowledge by Taylor and Williams come nowhere near the facts averred by the *Starr* plaintiff:

> Starr specifically alleges numerous incidents in which inmates in Los Angeles County jails have been killed or injured because of the culpable actions of the subordinates of Sheriff Baca. The complaint specifically alleges that Sheriff Baca was given notice of all of these incidents. It specifically alleges, in addition, that Sheriff Baca was given notice, in several reports, of systematic problems in the county jails under his supervision that have resulted in these deaths and injuries.

652 F.3d at 1216. On the question of knowledge, Barkes alleges merely that Taylor and Williams "were aware that the suicide rate in Delaware prisons was above the national average," that they knew "jailed detainees have a higher incidence of suicide than incarcerated inmates" but "there was only one suicide prevention policy applicable to both," and that both were "aware that the first twenty-four hours of a jailed detainee's detention were a time of high-suicide risk." App. at 171-72.

all the hallmarks of an attempted end run around the prohibition against using the vicarious liability doctrine of respondeat superior to get at the boss." *Id.* at 1217 (Trott, J., dissenting). In his view, "simply alleging generally that the Sheriff is answerable for the prisoner's safe-keeping doesn't cut it." *Id.*[17]

B

Barkes's allegations are inadequate under any of our sister circuits' interpretations of *Iqbal*. Barkes argues that FCM acted unlawfully in providing medical care at the HRYCI, and she would hold Taylor and Williams liable because they allegedly knew that FCM provided constitutionally inadequate medical care and failed to cure FCM's deficiencies. But nothing in the pleadings alleges that Taylor and Williams "personally displayed deliberate indifference," *Nelson*, 583 F.3d at 535, committed a "deliberate, intentional act," *Porro*, 624 F.3d at 1327-28; *Dodds*, 614 F.3d at 1195, or "wanted plaintiffs (or similarly situated persons) to be harmed." *Vance*, 701 F.3d at 204. Nor does Barkes challenge any of the policies promulgated by the DOC. In fact, she does the opposite, citing with approval the DOC's contract requiring FCM to use "[b]est [p]ractices" for mental health care as proof of

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[17] Although no statute holds Taylor and Williams responsible for medical conditions at the HRYCI, Judge Trott's observations apply equally well to this appeal:

> Sadly, bad things routinely happen in the best of jails. The same is true of hospitals, armies, churches, nursing homes, synagogues, boy scout troops, and legislatures. To attach personal legal liability to the leaders of these organizations, however, requires much more than, "Well, she must have known and must have been deliberately indifferent, because after all, it happened on her watch."

Starr, 652 F.3d at 1219 (Trott, J., dissenting).

wrongdoing. App. at 138. Barkes has alleged nothing beyond knowledge on the part of Taylor and Williams. She complains that Taylor spent "'very little' time on prison health care issues, delegating the responsibility to others." App. at 172. But after *Iqbal*, that fact alone merits a dismissal because Barkes must establish that Taylor and Williams "played more than a passive role in the alleged constitutional violation." *Dodds*, 614 F.3d at 1204. Claims brought because—in Barkes's words—the supervisor "presided over a system" fall well short of the standard established in *Iqbal*. App. at 745.

Barkes's claim fails even under the Ninth Circuit's approach in *Starr*. That opinion applied a pure deliberate indifference standard without a personal involvement requirement. Unlike in *Starr*, here no statute holds either Commissioner Taylor or Warden Williams "answerable" for medical care in Delaware prisons. In fact, a Delaware statute does the opposite insofar as it empowered Taylor to appoint a designee to administer the medical services contract. *See* Del.Code tit. 11, § 6517(12). He did just that, charging the DOC's bureau of management services with this duty. And as for Warden Williams, Barkes's claim is completely unsupported because he had no supervisory authority over FCM. FCM "answer[ed]" to Talley, but not to Taylor or Williams. *See Starr*, 652 F.3d at 1208. Barkes might have a cognizable supervisory liability suit against Talley under *Starr*, but not against two senior executives who did not supervise FCM. Unsurprisingly, when both Judges Farnan and Stark viewed Barkes's allegations through a pure deliberate indifference lens, they too concluded that "a reasonable factfinder could not determine that Defendants were deliberately indifferent to the risk of suicide." App. at 15, 82-82 [sic].

C

In light of *Iqbal*, we must also overrule the framework we adopted for supervisory liability claims in *Sample v. Diecks*, 885 F.2d 1099 (3d Cir.1989). The absence of deliberate indifference has not proven fatal to Barkes's claim because the majority has determined that Barkes's claim should be measured not by a pure deliberate indifference standard but by *Sample*, which enunciated a test unique to the supervisory context. The majority upholds *Sample*, noting that our old supervisory liability test already required the plaintiff to show deliberate indifference. Maj. Typescript at 23-24. True though that statement is, it fails to recognize that *Sample*'s version of deliberate indifference differs markedly from the subjective version of deliberate indifference required under the Eighth Amendment and omits the personal involvement requirement that all but one of our sister circuits have required. First, *Sample* does not require the supervisor's actual knowledge. Its version of deliberate indifference is objective, *Sample*, 885 F.2d at 1118, meaning that a plaintiff could establish deliberate indifference by establishing that the supervisor *should have* known of the excessive risk to inmate health and safety even if the plaintiff admits the supervisor actually had no such awareness.

Sample's objective quality is patent, insofar as it fashioned a test based on the objective deliberate-indifference standard that the Supreme Court established for municipal liability in *City of Canton v. Harris*, 489 U.S. 378, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989). In *Sample*, we actually grappled with the fact that the record before us did not indicate that the supervisor had actual knowledge of the allegedly

constitutionally inadequate prison procedures. *Sample*, 885 F.2d at 1118. But we answered that under *Canton*,

> this absence of prior incidents and knowledge thereof is not necessarily fatal to *Sample*'s case. As we have noted, [*Canton*] observed that there are situations in which the risk of constitutionally cognizable harm is so great and so obvious that the risk and the failure of supervisory officials to respond will alone support findings of the existence of an unreasonable risk, of knowledge of that unreasonable risk, and of indifference to it.

Id. The majority admits that this part of the test we expressed in *Sample* is untenable today. Maj. Typescript at 323-24. Nevertheless, after denuding *Sample* of its objective quality, the majority upholds a test that does not require the plaintiff to plead personal involvement by the supervisor. Under *Sample*, the plaintiff need only establish a "supervisory practice or procedure that [the supervisor] failed to employ." *Sample*, 885 F.2d at 1118. That is a far cry from the "personally displayed deliberate indifference," *Nelson*, 583 F.3d at 535, or "deliberate, intentional act," *Porro*, 624 F.3d at 1327-28; *Dodds*, 614 F.3d at 1195, that our sister circuits have required after *Iqbal*.

"Simply put, there's no special rule of liability for supervisors. The test for them is the same as the test for everyone else." *Porro*, 624 F.3d at 1328. None of the cases discussed—not even the Ninth Circuit's decision in *Starr*—has upheld a special test that applies only to supervisors. The majority disagrees, saying *Sample*'s "essence" is deliberate indifference, Maj. Transcript at 320, so we should continue to treat supervisors differently. Only by doing so, can the majority circumvent the District Court's prior holdings that the

record does not show deliberate indifference. App. at 15.[18] *Sample*'s unique combination of elements applies only to the supervisory form of deliberate indifference and permits Barkes to take her claim to trial without alleging Taylor and Williams's personal involvement.

With due respect to my colleagues' concern that *Iqbal* has "bedeviled" the courts of appeals, Maj. Typescript at 318, I perceive near unanimous agreement among our sister circuits. Barkes's claim plainly seeks to hold Taylor and Williams vicariously liable for, in Barkes's words, "presid[ing] over a system," App. at 745, that she deems unlawful. Today's decision invites plaintiffs to sue senior government officials whenever prison guards use force against an inmate or police officers mistreat a suspect. Regrettably, it exposes Commissioner Taylor and Delaware's prison wardens to lawsuits from any Delaware inmate with a complaint about FCM's services. "In an ideal world, [supervisors] would have achieved full compliance with the [law], but a public official's inability to ensure that all subordinate . . . employees follow the law has never justified personal liability. . . . [S]upervisors are not vicariously liable for their subordinates' transgressions." *Vance*, 701 F.3d at 203.

For these reasons, I would reverse the District Court's denial of Taylor and Williams's motion for

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[18] The majority argues Barkes's earlier claims are distinct, Maj. Transcript at 323, but it is a distinction without a difference. Whether Barkes argues Taylor and Williams failed to supervise DOC staff (as in the earlier claim) or FCM (as in the claim at issue now), knowledge and indifference is the common thread, and the fact that "there is still not sufficient evidence in the record from which a reasonable factfinder would conclude that Defendants were aware such an unreasonable risk was created and were indifferent to that risk" is fatal. App. at 16.

summary judgment on qualified immunity. *See Dodds v. Richardson,* 614 F.3d 1185, 1194 (10th Cir.2010) (explaining that questions of supervisory liability, though part of the substance of a section 1983 claim, are also part of the qualified immunity analysis); *al-Kidd v. Ashcroft,* 580 F.3d 949, 964-65 (9th Cir.2009) (same). None of the courts that have considered *Iqbal* have applied a standard like *Sample*'s, as the majority does today. The District Court's prior decision that Barkes cannot prove Taylor and Williams's deliberate indifference combined with the absence of any allegation of personal involvement on their part, entitles them to qualified immunity.

IV

Even had *Iqbal* not substantially changed the law of supervisory liability and had *Sample* remained good law, I would still hold that Taylor and Williams are entitled to summary judgment. According to *Sample,* the test for supervisory liability is as follows:

> Based on *City of Canton,* we conclude that a judgment could not properly be entered against [the supervisor] in this case based on supervisory liability absent an identification by [the plaintiff] of a specific supervisory practice or procedure that [the supervisor] failed to employ and specific findings by the district court that (1) the existing custom and practice without that specific practice or procedure created an unreasonable risk of prison overstays, (2) [the supervisor] was aware that this unreasonable risk existed, (3) [the supervisor] was indifferent to that risk, and (4) [the subordinate's constitutional tort] resulted from [the supervisor's] failure to employ that supervisory practice or procedure.

885 F.2d at 1118. The District Court erred by omitting *Sample*'s threshold prerequisite, namely, that the plaintiff identify "a specific supervisory practice or procedure that [the supervisor] failed to employ." *Id.*; *accord* Maj. Typescript at 317. It applied only *Sample*'s enumerated elements without ever requiring Barkes to identify a supervisory practice and misstated *Sample*'s causation element by omitting the identified supervisory practice. Judge Farnan properly applied *Sample* when he granted Taylor and Williams summary judgment on Barkes's first supervisory liability claim, and his analysis turned on *Sample*'s threshold element. And although the majority has accurately spelled out the *Sample* test—implicitly recognizing the District Court's error—it errs in concluding that Barkes has satisfied this essential element.

Barkes's complaint does not even attempt to make the identification required by *Sample*. Nevertheless, according to the majority:

> Appellees claim that Taylor and Williams should have enforced FCM's compliance with their contractual obligations, specifically by requiring FCM to adhere to up-to-date NCCHC standards, by properly administering the standards to which they adhered, and by requiring mental health screenings to have been conducted by a qualified mental health professional rather than an unqualified LPN, thus satisfying *Sample*'s threshold requirement.

Maj. Typescript at 330. The majority does not say where Barkes makes this contract enforcement allegation and my review of the pleadings failed to locate it either.

But even if Barkes *had* made this allegation, her *Sample* claim would fail because "enforcing" a contract is not "a supervisory practice or procedure." *Sample's* threshold element forces the plaintiff to explain not just that the supervisor failed to act, but also what he should have done differently. As we cautioned in *Sample:*

> [I]t is not enough for a plaintiff to argue that the constitutionally cognizable injury would not have occurred if the superior had done more than he or she did. The district court must insist that [the plaintiff] identify specifically what it is that [the supervisor] failed to do that evidences his deliberate indifference. Only in the context of a specific defalcation on the part of the supervisory official can the court assess whether the official's conduct evidenced deliberate indifference and whether there is a close causal relationship between the "identified deficiency" and the "ultimate injury."

885 F.2d at 1118. Barkes's contention that Taylor and Williams should have enforced the contract fails to meet our specificity requirements. The relevant question is: what "supervisory practice or procedure" should Taylor or Williams have implemented to enforce the contract? Commissioner Taylor already tasked a bureau with enforcing the FCM contract, and Warden Williams had no supervisory responsibilities over FCM. Pursuant to Delaware law, Joyce Talley, the chief of the DOC's Bureau of Management Services, supervised FCM. Barkes's utter failure to satisfy this element of *Sample*'s test underscores the fact that neither Taylor nor Williams supervised FCM. Barkes has targeted them merely as top-level DOC executives.

Even had *Sample* survived *Iqbal,* Taylor and Williams would be entitled to summary judgment. Judge Farnan granted them summary judgment on the first supervisory liability claim because Barkes failed to meet *Sample's* threshold requirement. Barkes did not allege in her third amended complaint a specific supervisory practice that Taylor and Williams should have performed, and any allegations that Taylor and Williams should have "enforced" the contract would do nothing to cure that omission. The District Court should have granted Taylor's and Williams's motion for summary judgment on the supervisory liability claim for the same reasons Judge Farnan did on the earlier supervisory liability claim.

V

Finally, I disagree with the majority's formulation of the constitutional right at issue. In addition to challenging the viability of supervisory liability after *Iqbal,* Taylor and Williams argued that Barkes's asserted right was not "clearly established." If true, that would also entitle them to qualified immunity. *See Reichle v. Howards,* ____ U.S. ____, 132 S.Ct. 2088, 2093, 182 L.Ed.2d 985 (2012). They argued that our case law had not clearly established a right "to supervision of the medical vendor by the prison administrators." Br. of Appellants at 19. The majority responds by stating "that the right [Barkes] assert[s], properly defined, is this: an incarcerated person's right to the proper implementation of adequate suicide prevention protocols." Maj. Typescript at 327. This is problematic for two reasons. First, the description of a right to suicide prevention protocols does not address Taylor and Williams's argument that there is no clearly established right to supervision over those charged with developing and carrying out suicide

prevention protocols since this supposed right concerns FCM's responsibilities.[19]

The more concerning error is that the majority's articulation of the constitutional right departs from the Eighth Amendment case law. The majority claims this right "to the proper implementation of adequate suicide prevention protocols," Maj. Typescript at 327, is established in our precedents, but it cites no case for this proposition, and I have found none. Indeed, the majority's description of a right to "adequate suicide prevention protocols" (and for that matter, Barkes's contention that FCM's administration of the NCCHC's 1997 standards by an LPN amounts to cruel and unusual punishment) would appear to be inconsistent with the weight of authority on this question. *See, e.g., Jenkins v. Cnty. of Hennepin,* 557 F.3d 628, 633 (8th Cir.2009) (plaintiff's allegations "that the Detention Center's intake procedures were insufficient to identify certain types of serious injuries" failed because "the range of acceptable medical care is broad. Jailers bear only the responsibility to identify medical needs that are so obvious that even a layperson would easily recognize the necessity for a doctor's attention."); *Brumfield v. Hollins,* 551 F.3d 322, 328 (5th Cir.2008) (granting defendants summary judgment where jail had no written policy but an oral policy required officers to place a detainee in an observation cell if the detainee appeared suicidal); *Belcher v. Oliver,* 898 F.2d 32, 34-35 (4th Cir.1990) ("The general right of pretrial detainees to receive

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[19] I disagree with the majority's belief that *Spruill v. Gillis*, 372 F.3d 218 (3d Cir.2004), established a right to supervision for a simple reason: *Spruill* was not a supervisory liability case, and the defendant had no supervisory relationship with the medical staff.

basic medical care does not place upon jail officials the responsibility to screen every detainee for suicidal tendencies.").

Even if it were true that clearly established law mandated "adequate suicide prevention protocols," the majority's requirement of the "proper implementation" of those protocols plainly violates the basic proposition that the Eighth Amendment does not impose liability for negligence. *See Colburn v. Upper Darby Twp.*, 946 F.2d 1017, 1024 (3d Cir.1991). "Failure to follow written procedures does not constitute *per se* deliberate indifference. If this were so, such a rule would create an incentive for jails to keep their policies vague, or not formalize policies at all." *Luckert v. Dodge Cnty.*, 684 F.3d 808, 819 (8th Cir.2012) (granting supervisor qualified immunity when the prison's "actual practice in dealing with suicide intervention . . . did not reflect [the prison's] written policy").

* * *

Barkes has targeted Taylor and Williams for "presid[ing] over a system." App. at 745. This runs afoul of *Iqbal* and the substantial weight of authority among our sister courts, which holds that supervisors like Taylor and Williams cannot be liable under section 1983 absent their personal involvement. Even under the Ninth Circuit's approach, Barkes would need to sue the person actually supervising FCM and cannot recover against the DOC's top executives. None of the courts of appeals since *Iqbal* have upheld a supervisory liability test like *Sample*'s, which treats supervisors differently from everyone else.

Even assuming *arguendo* that *Sample* remains good law, Barkes's allegation that Taylor and Williams

failed to enforce a contract with FCM does not satisfy *Sample*'s threshold element. Finally, the "right to the proper implementation of adequate suicide prevention protocols" is a departure from Eighth Amendment case law that had never been established before today. Because Taylor and Williams are entitled to summary judgment on the grounds of qualified immunity, I respectfully dissent.

APPENDIX B

UNITED STATES DISTRICT COURT,
D. DELAWARE.

C.A. No. 06-104-LPS

KAREN BARKES, et al.,

Plaintiffs,

v.

FIRST CORRECTIONAL MEDICAL, INC., et al.,

Defendants.

July 17, 2012.

MEMORANDUM OPINION

STARK, *District Judge*.

Pending before the Court are: (1) a Second Motion for Reargument, filed by Plaintiffs Karen Barkes, Alexandra Barkes, and Brittany Barkes ("Plaintiffs") (D.I.199); (2) a Motion for Summary Judgment filed by Defendants Stanley Taylor and Raphael Williams ("Defendants") (D.I.226); (3) a Motion for Summary Judgment filed by Plaintiffs (D.I.230); (4) Plaintiffs' Motion for Extension of Time to Designate an Expert (D.I.262); and (5) Plaintiffs' Motion for Permission to Supplement Plaintiffs' Second Motion for Reargument (D.I.263). For the reasons discussed below, the Court will deny all of the motions except for Plaintiffs' request to supplement their motion for reargument.

BACKGROUND[1]

Plaintiffs, the surviving family members of decedent Christopher Barkes ("Barkes"), filed this action pursuant to 42 U.S.C. § 1983, stemming from Barkes' suicide at the Howard R. Young Correctional Institute ("HRYCI").[2] Barkes committed suicide in his cell on November 14, 2004 while awaiting transport to the Violation of Probation ("VOP") Center in Sussex County the following day. (D.I. 51 at A152-53, A113) Barkes had been arrested on an administrative warrant on the previous day, arising from his having loitered in an attempt to purchase drugs, thus violating his probation. (*Id.* at A288) Barkes was on probation for a domestic abuse conviction in March 2004. (D.I. 246 at AA105)

Barkes was arrested on the afternoon of November 13, 2004. (D.I. 51 at A14, A288) That same day, at approximately 3 p.m, Barkes underwent a medical screening/intake procedure, conducted by a Licensed Prctical Nurse ("LPN") employed by First Correctional Medical, Inc. ("FCM"). (*Id.* at A1-A4, A154) Included in this procedure was an intake form which contained questions about his mental health and suicidal desires. (*Id.* at A145-47) Barkes indicated on the form that he had previously attempted suicide in 2003. (*Id.* at A148) Barkes did not, however, indicate on the form that he had additionally attempted suicide on three

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[1] More extensive background information can be found in prior opinions written by now-retired District Judge Joseph J. Farnan, Jr. (D.I.60), Magistrate Judge Mary Pat Thynge (D.I.165), and the undersigned judge (D.I.185).

[2] Specifically, Plaintiffs are Karen Barkes, individually and as administratrix of the Estate of Christopher Barkes, Alexandra Barkes, and Brittany Barkes, the widow and children of decedent Christopher Barkes. (D.I. 60 at 2; D.I. 259 at 1; D.I. 260 at 1)

other occasions: in 1997, while incarcerated at the HRYCI (*id.* at A77); and twice on the same day in September 2004 (*id.* at A78)—just 65 days prior to his eventual suicide—all of which was known to the State probation office (*id.* at A22). Barkes also indicated on the form he had no current suicidal ideation. (*Id.* at A147)

Additionally, as this Court has previously explained:

> The form lists 17 suicide risk factors for which each inmate is screened. If eight or more factors are checked, "yes," or if certain serious risk factors are present . . . the physician on call is notified and suicide precautions are initiated . . . [I]n addition to the Mental Health/Suicide Prevention Screening Form, the FCM intake nurse completed FCM's standard medical intake form, which asks whether the inmate shows any obvious signs of "altered mental status . . . or abnormal conduct.". . . [T]he standard medical intake form also contains a series of questions regarding the inmate's health history.

(D.I. 60 at 5-6) (internal citations omitted)

At approximately 6 p.m. on November 14, Barkes called his wife, Karen Barkes, from the HRYCI. (D.I. 246 at AA226) According to Ms. Barkes, Barkes told her that he was going to kill himself and asked that she tell his daughters that he loved them. (*Id.* at AA225) It is undisputed that Ms. Barkes did not contact anyone at the Delaware Department of Correction ("DOC") to advise them of the call she received from Barkes. (*Id.* at AA226)

Although there is no record evidence as to whether Defendants or DOC knew it on November 14, in the

two months between Barkes' unsuccessful suicide attempts and his eventual suicide he had been under the care of two mental health professionals. (D.I. 246 at AA11-32, AA33-35) Nothing in the record indicates that either of these professionals regarded Barkes as suicidal as of mid-November 2004. Among other things, he had been released from Mirmont Treatment Center in Media, Pennsylvania by Dr. Richard Silver on October 15, 2004. (D.I. 246 at AA33-34)

FCM was the contract medical provider at HRYCI at the time of Barkes' incarceration. In this capacity, FCM was responsible for inmate intake and medical screening. (D.I. 233 at PA118) The provision of medical care to patients was periodically reviewed by the DOC in monthly Medical Committee Review meetings. (D.I. 246 at AA247) DOC Bureau Chief Joyce Talley oversaw and represented the DOC at these meetings. (*Id.*)

According to internal documents as well as the deposition testimony of former DOC Commissioner Stanley Taylor, the HRYCI suicide prevention procedures were modeled on the standards promulgated by the National Commission on Correctional Health Care ("NCCHC"). (D.I. 269 at Ex. C; D.I. 200 at RA58, RA66-67) The NCCHC had issued model intake forms in 1997. (D.I. 233 at PA56, PA60-62) The forms used with Barkes were, in substance, the same as the 1997 NCCHC forms. (D.I. 200 at RA58-59) In 2003, the NCCHC revised its standards, including by eliminating the 1997 forms. (D.I. 269 at Ex. B) The same year, the NCCHC completed a periodic audit of HRYCI and accredited HRYCI. (*Id.* at Ex. A)

In 2005, DOC terminated its contract with FCM. (D.I. 258 at PA132-133)

Plaintiffs filed their original Complaint (D.I.1) on February 16, 2006. In that original Complaint, Plaintiffs alleged Eighth Amendment violations against DOC; Commissioner Taylor; Raphael Williams, Warden of the HRYCI; and FCM. Thereafter, on June 6, 2008, the Court entered a default judgment against FCM. (D.I.74)

On February 27, 2008, the Court granted summary judgment to Defendants Taylor and Williams on the original Complaint's Counts I, III, and IV. (D.I.60) On April 18, 2008, the Court denied Plaintiffs' motion for reconsideration of this ruling. (D.I.70) Following the Court's grant of leave to amend the pleadings (D.I. 73 at 3-4), Plaintiffs filed their Amended Complaint on June 13, 2008 (D.I.75). On March 30, 2009, the Court granted Defendants' motion to strike the amended complaint, but permitted Plaintiffs to further amend their pleadings. (D.I.81) On April 9, 2009, Plaintiffs filed their Second Amended Complaint. (D.I.82) Plaintiffs were then permitted to file a Third Amended Complaint limited to a claim of failure to supervise. (D.I. 150 at 14-15; D.I. 158)

On April 22, 2010, Plaintiffs filed their Third Amended Complaint, solely seeking relief as to Count V, which alleges that Defendants violated Barkes' civil rights by failing to adequately supervise the medical treatment provided at HRYCI by FCM. (D.I.152) Defendants' moved to dismiss the Third Amended Complaint. (D.I.153) Magistrate Judge Thynge's recommendation that Defendants' motion be denied (D.I.165) was adopted by the Court on February 28, 2011 (D.I.185).

On May 12, 2011, in conjunction with denying Plaintiffs' Motion for Sanctions relating to the purported late production by Defendants of Barkes'

probation records, the Court authorized Plaintiffs to file a second motion for reargument relating to the Court's grant of summary judgment to Defendants on Count I, III, and IV. (D.I.198) Plaintiffs filed their second motion for reargument shortly thereafter, on May 27, 2011. (D.I.199)

Subsequently, in February 2012, Defendants and then Plaintiffs filed motions for summary judgment on Count V. (D.I. 226; D.I. 230) On May 11, 2012, Plaintiffs filed their motion to extend the time to designate an expert and, on May 14, they filed their motion to supplement their motion for reargument. (D.I. 262; D.I. 263)

The Court heard oral argument on all pending motions on July 10, 2012. *See* Hr'g Tr. July 10, 2012 (D.I.274) (hereinafter "Tr.").

LEGAL STANDARDS

I. Motion for Reargument

Pursuant to Local Rule 7.1.5, a motion for reconsideration should be granted only "sparingly." The decision to grant such a motion lies squarely within the discretion of the district court. *See Dentsply Int'l, Inc. v. Kerr Mfg. Co.*, 42 F.Supp.2d 385, 419 (D.Del.1999); *Brambles USA, Inc. v. Blocker*, 735 F.Supp. 1239, 1241 (D.Del.1990). These types of motions are granted only if the court has patently misunderstood a party, made a decision outside the adversarial issues presented by the parties, or made an error not of reasoning but of apprehension. *See Shering Corp. v. Amgen, Inc.*, 25 F.Supp.2d 293, 295 (D.Del.1998); *Brambles*, 735 F.Supp. at 1241. "A motion for reconsideration is not properly grounded on a request that a court rethink a decision already made." *Smith v. Meyers*, 2009 WL 51195928, at

*1 (D.Del. Dec. 30, 2009); *see also Glendon Energy Co. v. Borough of Glendon*, 836 F.Supp. 1109, 1122 (E.D.Pa.1993). It is not an opportunity to "accomplish repetition of arguments that were or should have been presented to the court previously." *Karr v. Castle*, 768 F.Supp. 1087, 1093 (D.Del.1991).

A motion for reconsideration may be granted only if the movant can show at least one of the following: (i) there has been an intervening change in controlling law; (ii) the availability of new evidence not available when the court made its decision; or (iii) there is a need to correct a clear error of law or fact to prevent manifest injustice. *See Max's Seafood Cafe by LouAnn, Inc. v. Quinteros*, 176 F.3d 669, 677 (3d Cir.1999). However, in no instance should reconsideration be granted if it would not result in amendment of an order. *See Schering Corp.*, 25 F.Supp.2d at 295.

II. Summary Judgment

"The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(a). The moving party bears the burden of demonstrating the absence of a genuine issue of material fact. *See Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 n.10 (1986). An assertion that a fact cannot be—or, alternatively, is—genuinely disputed must be supported either by citing to "particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for the purposes of the motion only), admissions, interrogatory answers, or other materials," or by "showing that the materials cited do not establish the absence or presence of a

genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." Fed.R.Civ.P. 56(c)(1)(A) & (B). If the moving party has carried its burden, the nonmovant must then "come forward with specific facts showing that there is a *genuine issue for trial*." *Matsushita*, 475 U.S. at 587 (internal quotation marks omitted) (emphasis in original). The Court will "draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence." *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000).

To defeat a motion for summary judgment, the nonmoving party must "do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita*, 475 U.S. at 586; *see also Podohnik v. U.S. Postal Service*, 409 F.3d 584, 594 (3d Cir.2005) (stating party opposing summary judgment "must present more than just bare assertions, conclusory allegations or suspicions to show the existence of a genuine issue") (internal quotation marks omitted). However, the "mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment;" and a factual dispute is genuine only where "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). "If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Id.* at 249-50 (internal citations omitted); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) (stating entry of summary judgment is mandated "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which

that party will bear the burden of proof at trial"). Thus, the "mere existence of a scintilla of evidence" in support of the non-moving party's position is insufficient to defeat a motion for summary judgment; there must be "evidence on which the jury could reasonably find" for the non-moving party. *Anderson*, 477 U.S. at 252.

DISCUSSION

I. Plaintiffs' Motion for Reargument

Plaintiffs filed their second motion for reargument pursuant to this Court's Memorandum Order (D.I.198) granting permission to file such a motion due to the then newly-available probation records of Mr. Barkes. By their motion, Plaintiffs seek to reinstate Counts I, III, and IV of their original Complaint, on which the Court previously granted summary judgment to Defendants. (D.I.60) Count I asserted Defendants violated Barkes' Eighth Amendment right to be free from cruel and unusual punishment in that they were deliberately indifferent to his medical needs, all in violation of 42 U.S.C. § 1983. Count III asserted, again pursuant to Section 1983, that Defendants failed to train and/or maintained wrongful customs, practices, and policies, by presiding over a prison intake system that did not take into account the DOC probation records of admitted inmates. These policies are said to have both created the risk of an Eight Amendment violation and to have led to an actual violation of Barkes' Eighth Amendment protections. Count IV asserted a wrongful death action under 10 Del. C. § 3724.

Plaintiffs argue that had the record contained Barkes' probation records, the Court would have denied the summary judgment motion. Defendants

produced Barkes' probation records on September 28, 2010. (D.I. 198 at 2) Among other things, the probation records show that Barkes had attempted suicide twice in one day in September 2004 (D.I. 200 at RA10), had an ongoing problems [sic] with substance abuse, and that his probation officer noted Barkes' mental health troubles and proclivity to injure himself (*id.* at RA44-45).

In the Court's view, the probation records are new evidence that was not available to Plaintiffs at the time the Court decided Defendants' earlier summary judgment motion. However, the Court will deny Plaintiffs' motion for reargument because even the addition to the record of the probation records does not warrant altering the decision to grant judgment to Defendants on Counts I, III, and IV. Moreover, reargument is not necessary to prevent a manifest injustice.

A. Count I

Plaintiffs allege that State Defendants Commissioner Taylor and Warden Williams violated Barkes' Eighth Amendment right to be free from cruel and unusual punishment by their deliberate indifference to his need for medical care while he was incarcerated at HRYCI. The Court previously granted Defendants' motion for summary judgment on Count I. (D.I.60) Plaintiffs' request for reconsideration rests upon Barkes' probation records, which contain information relating to his proclivity for attempting suicide, including attempts while under the care of the DOC and/or probation officers.

Plaintiffs' burden is to demonstrate that Defendants "failed to act despite [their] knowledge of a substantial risk of serious harm." *Farmer v. Brennan*, 518 U.S.

825, 842 (1994). A "fact finder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious." *Id.* Obviousness of risk is determined by whether the risk is "longstanding, pervasive, well-documented, or expressly noted by prison officials." *Id.* The circumstances must point to Defendants having "been exposed to information concerning the risk and thus must have known about it." *Id.*

Plaintiffs essentially argue that Defendants had knowledge of both the existence of probation records and the fact that such probation records were not made available to DOC personnel during the time Barkes was in custody in November 2004. These two points, they contend, demonstrate Defendants' deliberate indifference to the danger posed to Barkes and others similarly situated to him. Assuming, as Plaintiffs appear to argue, that deliberate indifference in the context of Count I can be shown by Defendants' deliberate indifference to the medical needs of prisoners such as Barkes himself—and is not limited to evidence of deliberate indifference to Barkes personally—the Court nonetheless concludes that nothing in the probation records alters the prior conclusion: a reasonable factfinder could not determine that Defendants were deliberately indifferent to the risk of suicide.

The probation records make Barkes' suicide risk more pronounced, as they detail two suicide attempts while in custody and/or under supervision, as well as commentary from DOC personnel noting Barkes' mental instability. (D.I. 200 at RA10, RA44-45) However, based on the intake form Barkes completed, DOC personnel already knew that Barkes had attempted suicide in 2003 and had a history of mental

health treatment. (D.I. 51 at A147-148) Based on their own contemporaneous observation of Barkes while he was in custody on November 13 and 14, DOC personnel saw nothing to alert them that he was suicidal at that precise time. (*Id.* at A1-10). The additional information provided by the probation records would not have materially altered this mix of information—and, more importantly, its absence does not demonstrate deliberate indifference by Defendants Taylor and Williams.

Accordingly, the Court denies Plaintiffs' motion for reargument with respect to Count I.

B. Count III

Plaintiffs allege that Defendants violated Mr. Barkes' Eighth Amendment rights by demonstrating deliberate indifference in failing to properly train and supervise DOC personnel and failing to institute appropriate policies regarding suicide prevention. Plaintiffs contend by their motion for reargument that Barkes' probation records should have been made available to DOC personnel at the time he was in custody in November 2004. In Plaintiffs' view, that his probation records were unavailable constitutes an intake policy, implemented and supervised by Defendants, that created such a risk of suicide as to constitute deliberate indifference.

To succeed on a claim against supervisors based on prison policy or practices, Plaintiffs must identify a specific policy or practice that the supervisor failed to employ and show that: (1) the existing policy or practice created an unreasonable risk of Eighth Amendment injury; (2) the supervisor was aware that the unreasonable risk was created; (3) the supervisor was indifferent to that risk; and (4) the injury resulted

from the policy or practice. (D.I. 60 at 17) (citing *Sample v. Diecks*, 885 F.2d 1099, 1118 (3d Cir.1989)

Plaintiffs identify three policy alternatives that the DOC failed to implement: (1) requiring a file to be made listing DOC inmates who had attempted to commit suicide while in custody; (2) requiring a newly-admitted prisoner's DOC file be reviewed upon the prisoner's intake; and (3) requiring a probation violator's DOC file to be reviewed upon the violator's incarceration. (D.I. 199 at 16). However, even assuming that the existing policy created an unreasonable risk of Eighth Amendment injury, there is still not sufficient evidence in the record from which a reasonable factfinder could conclude that Defendants were aware such an unreasonable risk was created and were indifferent to that risk. Moreover, given the mix of information about Barkes' suicide attempt and mental health history that was available to DOC personnel, combined with their direct observation of him, there is no basis to conclude that the additional information contained in Barkes' probation records would have led to the prevention of his suicide. Thus, Plaintiffs have failed to demonstrate that the injury resulted from DOC policies.

Accordingly, Plaintiffs' motion for reargument with respect to Count III will be denied.

C. Count IV

Plaintiffs assert a wrongful death claim against Taylor and Williams pursuant to 10 Del. C. § 3724. In order to prevail on such a claim, Plaintiffs must demonstrate Defendants engaged in "gross or wonton negligence." 10 Del. C. § 4001. "Gross or wonton negligence" may be shown by "deliberate indifference." *Saunders v. Sullivan*, 608 A.2d 730 (Del.1992).

Plaintiffs contend that the deliberate indifference demonstrated with respect to Counts I and III also constitutes the necessary showing on Count IV. (D.I. 199 at 17). However, the Court has found Plaintiffs' showing to be inadequate with respect to Counts I and III; it follows that their showing with respect to Count IV is inadequate as well. Thus, the Court will deny Plaintiffs' motion for reargument as to Count IV.

D. Additional Evidence

In support of their motion for reargument, Plaintiffs present evidence in addition to Mr. Barkes' probation records. This evidence consists of deposition testimony of Commissioner Taylor, excerpts from NCCHC written materials detailing intake standards for suicidal prisoners, and several of Defendants' interrogatory responses.

As Plaintiffs acknowledge, the Court, in permitting them to file a motion for reargument, expressly limited the scope of such a motion to addressing the impact that the recently-produced probation records had on the Court's prior ruling on summary judgment. (D.I. 198 at 8) (granting leave to seek reargument "solely to the extent [Plaintiffs] wish to argue that the addition to the record of the Barkes probation records . . . should alter the Court's ruling") Plaintiffs' request that the Court consider "additional evidence" is inconsistent with the Court's order. Nonetheless, the Court has considered all of the "additional evidence" submitted in connection with the motion for reargument. The Court concludes that none of this evidence, either by itself or in conjunction with the probation records, alters the conclusions reached above. Accordingly, again, the motion for reargument will be denied.

II. Motion to Supplement Motion for Reargument

Plaintiffs filed their motion for reargument on May 27, 2011. (D.I. 199) Subsequently, they obtained additional discovery, including the 1997 NCCHC policies and forms as well deposition testimony from DOC probation officer Robin Moyer, DOC Bureau Chief Joyce Talley, and Defendants Taylor and Williams. (D.I. 233 at PA56-79, PA109-120, PA53-55; D.I. 200 at RA58-90)[3] On May 14, 2012, Plaintiffs filed a motion requesting leave to supplement their motion for reargument to account for this additional evidence. (D.I.263)

As already explained in connection with the discussion of Plaintiffs' motion for reargument, although the Court permitted Plaintiffs to file a motion for reargument based only on the probation records, the Court has considered not just the probation records but all of the other evidence Plaintiffs have asked the Court to consider. Given that the record contains all of the evidence Plaintiffs wish for the Court to consider, and that the Court has considered all of this evidence in connection with evaluating the motion for reconsideration, essentially all that is left of Plaintiffs' motion to supplement is a request to submit additional briefing relating to the motion for reargument.[4] In light of the extensive briefing already provided, including briefing on the cross-motions for summary judgment on Count V (which explicitly consider the new discovery), and the oral argument on all pending motions, the Court

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[3] The Court has been unable to find the Robin Moyer deposition testimony in the record.

[4] Both parties agreed with this assessment during the hearing. *See* Tr. at 27:13-25, 55:10-14.

concludes that further briefing on the motion for reargument would be unhelpful and unnecessary.

Accordingly, the Court will grant the motion to supplement to the extent it seeks to expand the record on the motion for reargument and deny it in all other respects.

III. Cross Motions for Summary Judgment on Count V

Plaintiffs and Defendants have filed cross-motions for summary judgment with respect to Count V of Plaintiffs' Third Amended Complaint. Count V, brought pursuant to 42 U.S.C. § 1983, alleges that Defendants violated Barkes' constitutional rights to be free from cruel and unusual punishment by failing to supervise and monitor First Correctional Medical ("FCM"), the third-party medical provider at HRYCI at the time of Barkes' detention and suicide.[5] The Court will deny both motions for summary judgment.

A. Sovereign Immunity and Qualified Immunity

Defendants contend that the Eleventh Amendment bars Plaintiffs' claim, as Defendants cannot be sued in their official capacities. The Eleventh Amendment forbids suits in federal courts against a state absent "unequivocal indication that the State intends to

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[5] In *Woloszyn v. County of Lawrence*, 396 F.3d 314, 320 (3d Cir.2005), the Third Circuit observed that a detainee's "vulnerability to suicide represents a serious medical need," so failure by a prison official to attend to such needs when she "knew or should have known" of their existence constitutes a violation of the detainee's civil rights. *See also Colburn v. Upper Darby Township*, 838 F.2d 663, 669 (3d Cir.1988) ("A serious medical need may exist for psychological or psychiatric treatment . . . [F]ailure to take any steps to save a suicidal inmate from injuring himself may also constitute a due process violation.").

consent to federal jurisdiction." *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238 n.1 (1985). Consistent with the Eleventh Amendment, the doctrine of sovereign immunity protects state officials from liability if the suit is such that "the state is the real, substantial party in interest." *Pennhurst State School & Hosp. v. Haider*, 465 U.S. 89, 101 (1984); *see also Hawaii v. Gordon*, 373 U.S. 57, 58 (1963) ("[R]elief sought nominally against an [official] is in fact against the sovereign if the decree would operate against the latter."). Plaintiffs respond that they are not suing Defendants in their official capacities but are, instead, suing Defendants only in their individual capacities. (*See, e.g.*, Tr. at 25-26)

As the Court previously held with respect to the same dispute in connection with Counts I, III, and IV, Plaintiffs' claims against Defendants must be dismissed to the extent such claims are brought against Defendants in their official capacities. (D.I. 60 at 11) However, to the extent Plaintiffs are proceeding against Defendants in their individual capacities, such claims are not barred by the Eleventh Amendment or sovereign immunity. (*Id.* at 12-13) Hence, Plaintiffs may proceed with Count V against Defendants in their individual capacities.

Defendants further argue that they are protected from liability under the doctrine of qualified immunity. Government officials performing discretionary functions are not liable for damages as long as they do not violate "clearly established statutory or constitutional rights." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). In evaluating the applicability of qualified immunity, the Court must determine "whether a constitutional right would have been violated on the facts alleged" and, if so, whether the

"right was clearly established." *Saucier v. Katz*, 533 U.S. 194, 200 (2001). Here, Defendants contend that Plaintiffs have failed to identify what constitutional right was violated and add that "receiving an intake screening which Plaintiffs believe to be inadequate" is not a "violation of a clearly established right." (D.I. 252 at 18) Plaintiffs respond that Barkes' had a clearly established constitutional right to receive adequate medical care and that they have demonstrated all of the elements necessary to show supervisory liability pursuant to *Sample*, 885 F.2d at 1099.

The Court concludes that Count V is not barred by qualified immunity. Barkes had a clearly established constitutional right to adequate medical care.[6] If Plaintiffs can demonstrate that Defendants failed to supervise and/or monitor FCM in such a manner as to subsequently give rise to Barkes' suicide, they may be able to impose liability on Defendants. *See generally Sample*, 885 F.2d at 1099.

B. Failure to Supervise FCM

Plaintiffs contend that in failing to supervise/monitor FCM to ensure proper prisoner intake procedures were in place, Defendants Taylor and Williams acted with "reckless or deliberate indifference" toward Barkes' need for medical care, thus violating his Eighth and Fourteenth Amendment guarantees of protection from cruel and unusual punishment and

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[6] *See Brown v. Plata*, 131 S.Ct. 1910, 1928 (2011) ("The basic concept underlying the Eight Amendment is nothing less than the dignity of man. . . . A prison that deprives prisoners of . . . adequate medical care . . . is incompatible with the concept of human dignity . . . .") (internal quotation marks omitted).

due process of law, respectively.[7] To the extent Barkes is viewed as a pretrial detainee, Plaintiffs must establish three elements: (1) that Barkes had a particular vulnerability to suicide; (2) that the custodial officer or officers knew or should have known of that vulnerability; and (3) that those officers acted with reckless indifference to the detainee's particular vulnerability. *See Woloszyn*, 396 F.3d at 320. With respect to the second prong, "[t]he strong likelihood of suicide must be so obvious that a lay person would easily recognize the necessity for preventive action." *Id.* To the extent Barkes is viewed as a sentenced prisoner (in custody on a violation of probation), Plaintiffs must establish that Defendants exhibited "deliberate indifference" to "a substantial risk of serious harm." *Farmer*, 511 U.S. at 828. Deliberate indifference is established by proof that Defendants knew of the serious risk to Barkes' welfare and failed to act. Such knowledge of the risk need not be actual and may be discerned from the fact that it was obvious, that is "longstanding, pervasive, well-documented or expressly noted by prison officials." *Id.* at 842.

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[7] The parties devote a significant amount of briefing to the issue of whether Barkes should be viewed as a pretrial detainee or, instead, a sentenced inmate. (*See, e.g.*, D.I. 232 at 18 n.3 ("In so far as Mr. Barkes was detained for a violation of parole, he had the status of a detainee and Fourteenth Amendment protections apply."); D.I. 252 at 3 ("State Defendants disagree with Plaintiffs [sic] claim that Decedent was taken to HRYCI as a pretrial detainee, and therefore 14th Amendment jurisprudence applies. . . . Decedent was brought to the HRYCI on an administrative warrant . . . as a sentenced offender.")) During oral argument, however, both parties agreed that the Court need not determine Barkes' status, nor whether his rights were governed by the Eighth and/or Fourteenth Amendments. (Tr. at 24-25, 53-54)

Plaintiffs argue, based on what they deem to be extensive documentation in Barkes' DOC probation records of his mental health history, substance abuse, and prior suicide attempts, that Barkes' vulnerability to suicide was "crystal clear and indisputable" and "should have been known to Mr. Taylor and Mr. Williams and their charges." (D.I. 232 at 18) Citing *Sample*, 885 F.2d at 1099, Plaintiffs assert that Defendants presided over a prisoner medical screening process—carried out by FCM—which Defendants knew was deficient, yet they failed to act to prevent the risk of prisoner suicide that materialized and led to Barkes' death.

Plaintiffs identify numerous purported deficiencies that Defendants neglected to remedy: FCM's failure to follow properly the NCCHC intake procedures, specifically in regard to the use of an improper 1997 form; FCM's continued reliance on the 1997 intake forms even after those forms had been eliminated from the 2003 NCCHC standards; FCM's failure to ensure Barkes' intake screening was conducted by a qualified health professional—as defined by the 2003 NCCHC standards—rather than a Licensed Practical Nurse ("LPN"); and FCM's lack of access to and failure to review DOC records of incoming inmates.

Plaintiffs assert that Taylor and Williams' knowledge of the deficient intake/medical screening system can be inferred from their deposition testimony. For instance, Plaintiffs stress Taylor's statement that he sought to abide by NCCHC protocols and both his and Williams' admissions that each was aware of and concerned by FCM's deteriorating provision of medical services. (D.I. 200 at RA58, RA66-67; D.I. 258 at PA135, PA136-37,

PA144-45) Both Defendants also testified to suspecting FCM of understaffing, so as to lower cuts and increase revenue. (D.I. 258 at PA135, PA136-37) Eventually, in 2005, DOC terminated its contract with FCM. (*Id.* at PA132-33) Defendants were also aware of problems with DOC's document management computer system. (*Id.* at PA151, PA152-55)

Having reviewed the record and the briefing, and listened to the arguments of counsel at the recent hearing, the Court concludes that there are numerous genuine disputes of material fact that preclude a grant of summary judgment to either side on Count V. Among the disputed facts, on which a reasonable factfinder could find for either side, are: (1) whether Barkes was vulnerable to suicide on November 13 and 14, 2004, given that he had previously attempted suicide four times (including three times while in custody and including twice within the past 65 days) but also given that he demonstrated no signs of vulnerability that were detected by DOC officials and he had recently been under the treatment of two mental health professionals, neither of whom—it appears—viewed Barkes as having a particular vulnerability to attempting suicide, and further given that Barkes received from DOC several prescription medications for mental health conditions but the record does not reveal what DOC learned about Barkes' then-present treatment in order to satisfy themselves it was appropriate to dispense such medications to him; (2) whether Defendants knew or should have known of Barkes' vulnerability to suicide, given his past record of suicide attempts but also given that FCM was implementing procedures that had been approved (to some degree) by NCCHC just the prior year; (3) whether any failure by DOC officials to know of Barkes' vulnerability to suicide was due to the

suicide prevention policies implemented by FCM, given that the probation records (detailing Barkes' suicide attempts and other aspects of his mental health history) were not made available to DOC officials but also given that FCM was implementing procedures that had been approved (to some degree) by the NCCHC just the prior year and DOC was monitoring FCM's activities at least through monthly Medical Review Committee (MRC) meetings; and (4) whether Defendants were deliberately indifferent to a serious or obvious risk of harm, given that Barkes was not placed on even the lowest level of suicide watch but also given that FCM had screening mechanisms in place, Barkes did not demonstrate a present suicidal ideation, and another individual at HRYCI at the very same time was taken to the HRYCI infirmary due to concerns about vulnerability to suicide (arguably evidencing the diligence of FCM and DOC officials with regard to suicide prevention).

Genuine disputes of material fact are also present with respect to the elements Plaintiffs must demonstrate to establish supervisory liability on the part of Defendants Taylor and Williams. Pursuant to *Sample*, 885 F.2d at 1118, Plaintiffs must show: (1) the existing policy created an unreasonable risk of constitutional violation; (2) Defendants were aware that the unreasonable risk was created; (3) Defendants were indifferent to that risk; and (4) the injury to Barkes resulted from the policy. The disputed facts, on which a reasonable factfinder could find for either side, include: (1) whether DOC's manner of supervising FCM's suicide prevention policy created an unreasonable risk that someone in Barkes' position would commit suicide, given the delegation of responsibility to an already-busy Bureau Chief Joyce Talley and Talley's lack of a "key manager," but also given that

FCM officials reported to Talley's deputy, Talley herself participated in monthly Medical Review Committee meetings, and Talley's testimony to the effect that it was not her duty to ensure FCM compliance with NCCHC standards;[8] (2) whether Taylor and Williams were aware an unreasonable risk was created, given the number of suicides that occurred in DOC facilities and their knowledge of "short staffing" but also given that Defendants did not directly interact with FCM; (3) whether Defendants were indifferent to the risk, given that DOC did not require FCM to change its policies (even after NCCHC altered its standards) but also given that NCCHC performed an audit of HRYCI in 2003 and found it to be in compliance; and (4) whether Barkes' suicide resulted from Defendants' failure to supervise FCM, given that Barkes was not placed on even the lowest level of suicide watch but also given that he was actually observed with frequency on the morning of November 14, 2004 and did not appear to exhibit any suicidal intentions.

In seeking summary judgment for themselves, Defendants contend that Plaintiffs' claim of failure to supervise/monitor a medical provider is not cognizable claim under § 1983. Defendants rely on *Spruill v. Gillis*, 372 F.3d 218, 236 (3d Cir.2004), to argue that non-medical prison officials are justified in "believing that the prisoner is in capable hands" if he/she is under the care of "medical experts." Only if such an official has reason to believe or actual knowledge that the "prison doctors or their assistants are mistreating a prisoner" may such officials be found liable. *Id.*

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[8] The Court has considered the parties' arguments and the deposition excerpts submitted by letter following the oral argument. (D.I. 272; D.I. 273)

Defendants assert that Taylor and Williams had no actual knowledge or reason to believe that prisoners were being mistreated by FCM personnel, particularly as the DOC official with direct supervisory responsibility over FCM was DOC Bureau Chief Joyce Talley, not either of the Defendants.

Defendants' arguments do not justify granting their motion for summary judgment. The viability of Plaintiffs' theory that Defendants may be liable for failure to supervise FCM was largely decided when the Court denied Defendants' motion to dismiss. (D.I. 185; *see also Jackson v. Taylor*, 2006 WL 2347429, at *2 (D.Del. May 12, 2006) ("While vicarious liability is not available, supervisory liability may attach if the supervisor implemented deficient policies and was deliberately indifferent to the resulting risk or if the supervisor's actions and inactions were 'the moving force' behind the harm suffered by the plaintiff.")). Additionally, Defendants have cited no case holding that a failure to supervise claim cannot be made out in the context of a failure to supervise a third-party provider of medical care in a prison facility.[9]

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[9] *Spruill*, 372 F.3d at 236, holds that non-medical prison officials are not *vicariously* liable for injuries to inmates resulting from the provision of medical care by trained physicians. Here, however, Plaintiffs do not seek to impose vicarious liability on Defendants for the misdeeds of FCM personnel but, rather, contend that Taylor and Williams themselves are responsible for Barkes' harm by having failed to ensure that a proper system of medical intake procedures was in place and implemented at the HRYCI. Moreover, *Spruill* contemplates that liability may be imposed on an official who has "reason to believe (or actual knowledge) that prison doctors or their assistants are mistreating (or not treating) a prisoner." *Id.* at 236. Plaintiffs' failure to supervise claim alleges that Taylor and Williams were aware of the deficiencies to the prisoner medical intake procedures

Defendants' contentions regarding the role of Ms. Talley do not warrant granting summary judgment but, instead, are part of the mix of genuine disputes of material fact, as explained above.

Defendants additionally argue that supervisory liability cannot be established under § 1983 because such suits cannot be based upon theories of *respondeat superior*. "[E]ach Government official, his or her title notwithstanding, is only liable for his or her own misconduct." *Ashcroft v. Iqbal*, 556 U.S. 662, 677 (2009). As the Court has previously stated, it is undisputed that neither Taylor nor Williams had any personal involvement with Barkes' suicide. (D.I. 60 at 16) However, Plaintiffs seek to hold Defendants Taylor and Williams liable for their *individual* actions (in failing to supervise) rather than for the actions of their subordinates.

In sum, the record is such that a reasonable factfinder could find that Plaintiffs have proven all of the elements of their claim, so summary judgment for Defendants is not warranted. However, the record is also such that a reasonable factfinder could alternatively find that Plaintiffs have failed to prove all of the elements of their claim, rendering summary judgment for Plaintiffs improper. Accordingly, the Court will deny both cross-motions for summary judgment and set the case for trial on Count V.

IV. Motion for Extension of Time to Designate an Expert

Plaintiffs seek to extend the time for designation of an expert. Under the governing scheduling order, the time for designating an expert on an issue for which a

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facilitated by FCM, and there is evidence from which a reasonable factfinder could so find.

party bears the burden of proof was October 11, 2011. (D.I. 197) Under previous scheduling orders in this case, the deadline for designating an expert was May 31, 2007 and November 15, 2010. (D.I. 17; D.I. 164) At no time has Plaintiff designated an expert.

Plaintiffs now wish to provide expert testimony regarding the 1997 NCCHC standards, in particular with regard to prisoner intake procedures and intake forms. Plaintiffs argue that the untimeliness of their request results from the delayed production of the 1997 NCCHC standards by Defendants. Plaintiffs also point to the deposition testimony of several DOC employees, including Defendants Taylor and Williams, which speak to the importance of the 1997 NCCHC standard. These depositions were only recently conducted.

Defendants oppose Plaintiffs' request. They argue that Plaintiffs are at fault for failing to meet the deadline and granting the requested extension would prejudice Defendants. Defendants further contend that the 1997 NCCHC standards are irrelevant and that any expert who would testify on the points on which Plaintiffs wish to present an expert would fail to meet the requirements of Federal Rules of Evidence 402 and 703.

Federal Rule of Civil Procedure 16(b)(4) provides "a schedule may be modified for good cause and with the judge's consent." The "good cause standard under Rule 16(b) hinges on the diligence of the movant, and not on prejudice to the non-moving party." *Roquette Freres v. SPI Pharma, Inc. CA*, 2009 WL 1444835, at *4 (D.Del. May 21, 2009). Here, Plaintiffs have failed to demonstrate good cause for their repeated failure to meet the deadlines for designating an expert. Thus, Plaintiffs' motion will be denied.

The Court is unpersuaded by Plaintiffs' contention that Defendants are at fault for the belated production of the 1997 standards. The NCCHC is an independent body and the Court discerns no reason from the record that would have prevented Plaintiffs from obtaining the 1997 standards and intake forms at an earlier point in this litigation. Additionally, Plaintiffs' contention that they needed to complete certain depositions before they could recognize that they needed an expert is unavailing. If Plaintiffs felt that Defendants were being too slow in making their witnesses available, Plaintiffs could have sought relief from the Court pursuant to its Discovery Matters procedures. (*See* D.I. 197 at 3, para. 1(e)) More fundamentally, Plaintiffs could have asked for an extension prior to the expiration of the deadline for designating an expert. Finally, in considering whether the Court should exercise its discretion to assist Plaintiffs under these circumstances, the Court observes that, by moving for summary judgment on the only remaining count (Count V), Plaintiffs represent that they are of the view that the record already contains adequate evidence from which a reasonable factfinder must find for Plaintiffs, even absent any expert testimony.

CONCLUSION

For the reasons discussed above, Plaintiffs' motion to supplement its motion for reargument is granted to the extent it seeks to expand the record on the motion for reargument and denied in all other respects. All of the other pending motions—Plaintiffs' motion for reargument, Plaintiffs' motion for leave to designate an expert, and both sides' cross-motions for summary judgment on Count V—are denied. An appropriate Order will be entered.

APPENDIX C

UNITED STATES DISTRICT COURT,
D. DELAWARE.

Civil Action No. 06-104-JJF.

KAREN BARKES, individually; Tina Grossman as next friend of Brittany Barkes; Tina Grossman as next friend of Alexandra Barkes; and Karen Barkes as administratrix of the Estate of Christopher Barkes,

Plaintiffs,

v.

FIRST CORRECTIONAL MEDICAL, INC.; Stanley Taylor; Raphael Williams; Certain Unknown Individual Employees of State of Delaware Department of Correction; Certain Unknown Individual Employees of First Correctional Medical, Inc., and State of Delaware, Department of Correction,

Defendants.

Feb. 27, 2008.

MEMORANDUM OPINION

JOSEPH J. FARNAN, JR., *District Judge*.

Pending before the Court is State Defendants' Motion for Summary Judgment (D.I. 49). For the reasons discussed below, the Court will grant State Defendants' Motion.

BACKGROUND

A. Procedural Background

Plaintiffs, Karen Barkes, individually and as adminstratrix of the Estate of Christopher Barkes, Tina Grossman, as next friend of Brittany Barkes, and Tina Grossman, as next friend of Alexandra Barkes, the widow and minor children of decedent Christopher Barkes, brought this lawsuit against First Correctional Medical, Inc. ("FCM"), Stanley Taylor, the Commissioner of the Delaware Department of Corrections ("DOC")(now retired)("Commissioner Taylor"), Raphael Williams, Warden of the Howard R. Young Correctional Institution ("Warden Williams"), Certain Unknown Individual Employees of State of Delaware Department of Correction, Certain Unknown Individual Employees of First Correctional Medical, Inc., and the State of Delaware Department of Corrections. Plaintiffs brought this action under 42 U.S.C. § 1983, alleging that Defendants had violated the Eight Amendment through their deliberate indifference to Christopher Barkes' serious medical needs, and by failing to train and/or maintaining wrongful customs, practices and polices. Plaintiffs also asserted wrongful death actions and survival actions under Delaware statutes 10 *Del. C.* §§ 2724 and 3701. The DOC, Commissioner Taylor, and Warden Williams ("the State Defendants") filed a cross-claim against FCM based on a contractual indemnification provision. Plaintiffs have not identified or served the "Unknown Individual Employees" of the DOC or FCM, and the last day to amend pleadings was January 31, 2007.[1] (D.I. 17.)

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[1] Plaintiffs' discovery in this case was interrupted for four months by "unexpected and unavoidable reasons" which are set

State Defendants filed this Motion for Summary Judgment (D.I.49) *on* October 15, 2007.

B. Factual Background

1. Christopher Barkes

Decedent, Christopher Barkes ("Mr.Barkes"), committed suicide in his cell at Howard R. Young Correctional Institution ("HRYCI") on Sunday, November 14, 2004. He was arrested by Wilmington Police on Saturday, November 13, 2004 for violating his probation, and admitted to the Booking and Receiving Unit at approximately 2:45 p.m., pending transportation to the VOP Center in Sussex County on Monday, November 15, 2004.

Mr. Barkes had a history of drug and alcohol abuse. (D.I. 50 at 6; D.I. 546 at 4.) After a ten-year period of sobriety in his twenties, he began abusing prescription drugs and alcohol at the age of 28. (*Id.*) In 1997, Mr. Barkes was the driver in an automobile accident that resulted in the death of two people. (*Id.*) He pled guilty to two counts of vehicular homicide, and was sentenced to two years in prison. (*Id.*) Following his release from prison in 1999, Mr. Barkes continued to

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forth in an affidavit by Plaintiffs' counsel, Jeffrey Martin, Esquire. Despite the fact that discovery in this case ended on August 31, 2007, Plaintiffs contend that there are still facts to be discovered, including the identity of the intake person at Howard R. Young Correctional Institution: the nurse employed by FCM who did the initial medical and mental health screening of Christopher Barkes. Plaintiffs also contend that the State Defendants have not yet produced the DOC Suicide Prevention Policy and Procedures (SOP 190.04) in effect on the date of Christopher Barkes' death. In response, State Defendants contend that the relevant version of SOP 190.04 was produced to Plaintiffs by March 9, 2007, and depict the pertinent Bates range. (D.I. 54 at 5.)

suffer intermittent relapses into substance abuse, but he was sober for approximately two years before he married Karen Barkes ("Mrs.Barkes") in April 2003.[2] (D.I. 50 at 6.)

Mr. Barkes first attempted suicide during his first incarceration at HRYCI following the 1997 automobile accident. (D.I. 54 at 5.) He collected several pills over the course of several days to gather enough to kill himself. (*Id.*) When the pills were discovered, Mr. Barkes was taken to St. Francis Hospital for four days before returning to HRYCI. (*Id.*) In November 2003, Mr. Barkes was hospitalized for depression and drug addiction. (D.I. 50 at 6.) The record is unclear as to whether this hospitalization was in connection with a suicide attempt.[3] In December 2003, Mr. Barkes attempted suicide by overdosing on heroin, and was hospitalized. (D.I. 50 at 6-7; D.I. 54 at 5-6.) On September 10, 2004, a DOC probation officer took Mr. Barkes to Wilmington Hospital for excessive alcohol consumption.[4] (D.I. 54 at 6.) During this hospitalization, Mr. Barkes tried to hang himself with a bed sheet

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[2] Mr. Barkes had been married previously, and had two children, Plaintiffs Alexandra and Brittany Barkes, from that marriage. (D.I. 50 at n. 3.)

[3] Mrs. Barkes testified in deposition that Mr. Barkes's November 2003 hospitalization was not in connection with a suicide attempt. However, in their brief, Plaintiffs contend: "There was some confusion" in Mrs. Barkes's deposition, and she did not recall that Mr. Barkes, who had been living with his aunt, took a number of prescription pills, and was admitted to Wilmington Hospital as "suicidal." (D.I. 50 at 6; D.I. 54 at n. 5.)

[4] Mrs. Barkes testified that the DOC probation officer that found Mr. Barkes at his friend's house was not Mr. Barkes' probation officer. (D.I. 51 at A21.)

and IV tubing, but his attempt was thwarted. (D.I. 54 at 6; D.I. 50 at 7.)

After being booked on November 13, 2004, Mr. Barkes received a medical evaluation conducted by FCM medical staff.[5] (D.I. 50 at 7.) FCM contracted with the DOC to provide all medical services to inmates. (*Id.*) As part of the medical evaluation, FCM staff completed a Mental Health/Suicide Prevention Screening Form, created by FCM. (*Id.*) The form lists 17 suicide risk factors for which each inmate is screened. (D.I. 50 at 7.) If eight or more factors are checked "yes," or if certain serious risk factors are present (for example, the arresting officer believes the inmate is a suicide risk), the physician on call is notified and suicide precautions are initiated. (*Id.*) Mr. Barkes answered "yes" to two of the 17 screening questions: (1) that he had a psychiatric history; and (2) that he had previously attempted suicide by overdose in 2003. (D.I. 50 at 8.) Mr. Barkes' suicide attempt at HYRCI during his first incarceration and his suicide attempt in September 2004 are not listed on the form. (*Id.*)

In addition to the Mental Health/Suicide Prevention Screening Form, the FCM intake nurse completed FCM's standard medical intake form, which asks whether the inmate shows any obvious signs of "altered mental status . . . or abnormal conduct." (*Id.*) According to the form, Mr. Barkes did not. (*Id.*) The standard medical intake form also contains a series of questions regarding the inmate's health history. Mr. Barkes answered "no" to the question of whether he had a "history of drug abuse." (*Id.*) The FCM intake nurse completed a referral to mental health services

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[5] The intake nurse was an LPN, or "Licensed Practical Nurse."

on a "routine" urgency level based on Mr. Barkes psychiatric history, and the reported 2003 suicide attempt. (D.I. 54 at 8.) Mr. Barkes medical file also contains a prescription chart, which depicts the prescriptions Mr. Barkes received at HRYCI, the dosages and the frequency. He received dosages of Effexor and Serquel the evening of November 13, 2004, but did not receive his medication on November 14, 2004 because the medical cart had not yet arrived before he committed suicide. (D.I. 50 at 9.)

Mr. Barkes was housed in a cell in the Booking and Receiving area of HRYCI. (D.I. 50 at 8.) Sometime during the evening of November 13, 2004, Mr. Barkes telephoned Mrs. Barkes. Mrs. Barkes stated that Mr. Barkes told her "I can't live this way anymore." (D.I. 54 at 6.) Mr. Barkes ate breakfast in his cell on November 14, 2004 at 8 a.m., and correctional officers checked on Barkes periodically throughout the morning. None of the correctional officers who worked in Booking and Receiving during Mr. Barkes incarceration remembered anything unusual about him, or that alerted them that he was having a suicidal crisis. (D.I. 50 at 9-10.) At 10:45 a.m., 10:50 a.m., and 11:00 a.m, correctional officers observed Mr. Barkes lying awake on his bed. At 11:35 a.m., a correctional officer arrived at Mr. Barkes' cell to deliver his lunch, and found him hanging by a sheet from a steel partition in the room. (D.I. 50 at 10.) Medical staff responded to the correctional officer's Medical Emergency alert and began CPR. Paramedics and EMTs arrived and transported Mr. Barkes to Christiana Hospital, but Mr. Barkes did not regain consciousness. (D.I. 50 at 11.)

2. DOC's Suicide Prevention Policy

In addition to the FCM's health and mental health screening practices, the DOC, and HRYCI, have, and had, in place a Suicide Prevention Policy, SOP 190.04, which applies to all personnel, and is reviewed and approved by a medical/mental health professional. (D.I. 50 at 9.) Under the policy, training is provided to institutional personnel on identification of inmates at risk for suicide. The policy outlines potential indicators of suicidal crisis, and requires that personnel refer inmates deemed to be at risk for suicide to medical personnel.

As evidence that the DOC's mental health and suicide policies and procedures in place at HRYCI at the time of Mr. Barkes's suicide were constitutionally defective, Plaintiffs cite to a *News Journal* article that lists Delaware inmates who died in DOC custody between 2000 and April 2005, and an August 2005 "Special Report" from the United States Department of Justice Bureau of Justice Statistics regarding statistics on suicide and homicide deaths in prisons nationwide for the proposition that Delaware's suicide mortality rate in its state prisons was double the national average in 2000-2001. (D.I. 54 at 10.)

Plaintiffs also point to a December 29, 2006 "Findings Letter" from the United States Department of Justice ("USDOJ") regarding a 2006 investigation into healthcare conditions in five Delaware prisons, including HRYCI; a December 19, 2006 "Memorandum of Agreement" between the State of Delaware and the USDOJ regarding the 2006 investigation; and an April 30, 2007 DOC "Action Plan" report in response to the USDOJ's Findings Letter. The USDOJ investigation found substantial deficiencies with the mental health care provided at the prisons, and

specifically found that practices regarding suicide prevention "substantially depart[ed] from generally accepted professional standards and expose inmates to significant risk of harm," leading to a "system in which inmates at risk for suicide are not adequately identified." (D.I. 54 at 11-12.)[6]

The documents cited by Plaintiffs were not produced to Defendants during discovery, and Plaintiffs did not indicate in their responses to interrogatories that they intended to rely on these documents in support of their contentions. (D.I. 56 at 8.) The State made no admissions of liability in connection with the 2006 USDOJ investigations, and the Memorandum of Agreement states that it is inadmissible in litigation. (D.I. 56 at 8.)

LEGAL STANDARD

In pertinent part, Rule 56(c) of the Federal Rules of Civil Procedure provides that a party is entitled to summary judgment if a court determines from its examination of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). In determining whether there is a triable dispute of material fact, a court must review all of the evidence

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[6] The USDOJ Findings Letter also states that the State of Delaware's correctional staff "received insufficient training in the area of suicide prevention," that "the intake process also fails to ensure that appropriate action is taken when an inmate reports a history of suicidal thoughts or actions," that "the State fails to ensure that inmates identified as being at risk for suicide are housed in cells which are sufficient to ensure their safety," and that "the State fails to ensure that appropriate levels of observation are maintained." (*Id.* at 12-13.)

and construe all inferences in the light most favorable to the non-moving party. *Valhal Corp. v. Sullivan Assocs., Inc.*, 44 F.3d 195, 200 (3d Cir.1995).

However, a court should not make credibility determinations or weigh the evidence. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000). To properly consider all of the evidence without making credibility determinations or weighing the evidence, a "court should give credence to the evidence favoring the nonmovant as well as that evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that evidence comes from disinterested witnesses." *Id.* at 151 (internal citations omitted).

To defeat a motion for summary judgment, the non-moving party must "do more than simply show that there is some metaphysical doubt as to the material facts. . . . In the language of the Rule, the non-moving party must come forward with specific facts showing that there is a genuine issue for trial." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986)(internal citations omitted). However, the mere existence of some evidence in support of the non-movant will not be sufficient to support a denial of a motion for summary judgment; there must be enough evidence to enable a jury to reasonably find for the non-movant on that issue. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). Thus, if the evidence is "merely colorable, or is not significantly probative," summary judgment may be granted. *Id.*

ANALYSIS

In their motion for summary judgment, the State Defendants contend: (1) Plaintiffs have adduced no evidence suggesting that Commissioner Taylor or Warden Williams exhibited "deliberate indifference" to Mr. Barkes' serious medical needs, since neither had any personal involvement with Mr. Barkes' incarceration or suicide; (2) Plaintiffs' Eighth Amendment claim against State Defendants based upon "failure to train" or the maintenance of wrongful practices and policies, resulting in Mr. Barkes' suicide is unsupported by the evidence, and is barred as a matter of law; (3) the Court should grant summary judgment on Plaintiffs' "wrongful death" claim against State Defendants because the record contains no evidence upon which a reasonable fact finder could find liability.

A. Eleventh Amendment and Sovereign Immunity

First, the Court will dismiss Plaintiffs' claims against the DOC. State Defendants correctly argue that the doctrine of sovereign immunity bars suits for monetary damages against the state, absent waiver or Congressional override. *Kentucky v. Graham*, 473 U.S. 159, 169 (1985). The Supreme Court has held that neither a State nor its officials acting in their official capacities are "persons" within the meaning of Section 1983. *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 71, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989). Further, a state agency or other entity may be considered an "alter ego" or "arm of the state" such that it is entitled to immunity under the Eleventh Amendment. *Christy v. Pa. Turnpike Comm'n*, 54 F.3d 1140, 1144 (3d Cir.1995). Numerous cases in this district have recognized that the DOC is an arm of the State of Delaware and not a "person" subject to liability under

Section 1983. *See Arnold v. Minner*, No. 04-1346, 2005 WL 1501514, at *4 (D.Del. June 24, 2005) (citations omitted). Because the DOC is entitled to immunity pursuant to the Eleventh Amendment, the Court will grant State Defendants' motion for summary judgment on Plaintiffs' § 1983 claims against the DOC.

The Court will also grant summary judgment in favor of Defendant on Plaintiffs' § 1983 claims against Commissioner Taylor and Warden Williams in their official capacities. Claims made against state officials in their official capacities are treated as claims made against the state itself. *Will v. Michigan Dep't of State Police*, 491 U.S. at 71.

B. Plaintiffs' Section 1983 Claims Against Taylor and Williams in their Personal Capacities

In their Complaint, Plaintiffs allege that State Defendants violated Barkes' Eighth Amendment right to be free of cruel and unusual punishment by their alleged "deliberate indifference" to Barkes' serious medical needs. Plaintiffs also allege that State Defendants failure to properly train and supervise its personnel and/or failure to institute appropriate polices regarding suicide prevention constituted deliberate indifference to Mr. Barkes' rights.

State Defendants contend that there is no evidence in the record that the individual State Defendants, Commissioner Taylor and Warden Williams, had any interaction with Mr. Barkes, nor any knowledge of his condition which could meet the legal standard for § 1983 liability on an Eighth Amendment claim. State Defendants further contend that liability asserted against the Commissioner Taylor and Warden Williams is premised on an impermissible vicarious liability theory since Plaintiffs cannot identify any

acts or omissions personally undertaken by Commissioner Taylor or Warden Williams against Mr. Barkes. State Defendants contend that there is no evidence that any State employee at HRYCI was deliberately indifferent to Mr. Barkes' medical needs, since no DOC personnel could have possibly foreseen, anticipated or prevented Mr. Barkes' suicide. State Defendants further contend that there is no evidence that Commissioner Taylor or Warden Williams were deliberately indifferent in providing DOC training or policies/practices, resulting in Mr. Barkes' suicide.

In their response to State Defendants' motion, Plaintiffs provide a lengthy summary of Eighth Amendment jurisprudence, and contend that Commissioner Taylor and Warden Williams are liable based on their responsibility for a "policy that created a substantial risk of serious (indeed, of ultimate) damages to *all* suicidal inmates and detainees, including Mr. Barkes." (D.I. 54 at 25.) Plaintiffs contend that proof of deliberate indifference need not be personal to the injured inmate, but can relate to a risk faced generally by all prisoners. Plaintiffs further contend that there exists sufficient evidence to establish a material issue of fact including: (1) the mental health screening form which indicates that Mr. Barkes had attempted suicide the previous year, and had a psychiatric history; (2) the DOC applied an arbitrary numerical analysis based on the mental health screening form when determining suicide potential; (3) the intake nurse was not a registered nurse, but only an LPN; (4) the DOC knew of Mr. Barkes' history of drug and alcohol problems; (5) Mr. Barkes had previously attempted suicide at HRYCI, and, in September 2004, had attempted suicide in Wilmington Hospital, after being brought to the hospital by a probation officer; (6) Mr. Barkes was the only inmate in the Booking and

Receiving area, so he was effectively in solitary confinement; (7) Delaware's rate of prison suicides during this time period was more than twice the national average; (8) in 2006, the USDOJ found that Delaware prisons demonstrated inadequate psychiatric coverage and training with respect to suicide prevention. (D.I. 54 at 30-32.) Based on this evidence, Plaintiffs contend that a reasonable jury could infer that Commissioner Taylor and Warden Williams had actual knowledge of the unreasonable risk created by their deficient policies.

In response, State Defendants contend that Plaintiffs impermissibly rely on documents that were never produced in discovery, and have not been referenced, relied upon or opined upon by any witness in this cases [sic]. Defendants further contend that Plaintiffs have failed to reference affidavits of fact witnesses, sworn averments, or actual facts of record that would create a genuine issue of material fact. Defendants point out that the USDOJ documents were created in 2006, and cannot be used to show knowledge on the part of State Defendants of alleged problems with suicide prevention protocols at HRYCI in November 2004. Further, the USDOJ documents are generalized findings, and do not equate to a finding that Mr. Barkes' constitutional rights were violated, or that Commissioner Taylor and Commissioner Williams were deliberately indifferent to Mr. Barkes' obvious medical needs.

As is well established, supervisory liability cannot be imposed under § 1983 on a respondeat superior theory. *See Monell v. Department of Social Services*, 436 U.S. 658 (1978); *Rizzo v. Goode*, 423 U.S. 362 (1976). "'A[n individual government] defendant in a civil rights action must have personal involvement in

the alleged wrongdoing; liability cannot be predicated solely on the operation of respondeat superior.'" *Evancho v. Fisher*, 423 F.3d 347, 353 (3d Cir.2005) (quoting *Rode v. Dellarciprete*, 845 F.2d 1195, 1207 (3d Cir.1988). Personal involvement can be shown through allegations that a defendant directed, had actual knowledge of, or acquiesced in, the deprivation of a plaintiff's constitutional rights. *Id.*; *see Monell v. Department of Social Services*, 436 U.S. 658, 694-95 (1978). Supervisory liability may attach if the supervisor implemented deficient policies and was deliberately indifferent to the resulting risk, or the supervisor's actions and inactions were "the moving force" behind the harm suffered by the plaintiff. *Sample v. Diecks*, 885 F.2d 1099, 1117-118 (3d Cir.1989); *see also City of Canton v. Harris*, 489 U.S. 378 (1989); *Heggenmiller v. Edna Mahan Corr. Inst. for Women*, No. 04-1786, 128 Fed. Appx. 240 (3d Cir.2005).

It is undisputed by Plaintiffs that Defendants Taylor and Williams had no personal involvement in the events surrounding Mr. Barkes's suicide, and there is no evidence in the record to suggest that the DOC Commissioner or the HRYCI Warden had any interaction with Barkes, or knowledge of his condition. Plaintiffs attempt to hold Commisioner Taylor and Williams liable "in their individual capacities for their deliberate indifference to policies and procedures that created a substantial risk of serious injury" to Mr. Barkes. (D.I. 54 at 28.) Supervisory liability presents the question of whether Defendants were responsible for—"whether [they were] the moving force behind"—the alleged constitutional tort. *Sample*, 885 F.2d at 1116-1117. To succeed on a claim against supervisors based on prison policy or practices, Plaintiffs must identify a specific policy or practice that the supervisor

failed to employ and show that: (1) the existing policy or practice created an unreasonable risk of the Eighth Amendment injury; (2) the supervisor was aware that the unreasonable risk was created; (3) the supervisor was indifferent to that risk; and (4) the injury resulted from the policy or practice.[7] *Id.* at 1118.

First, Plaintiffs have not set forth evidence sufficient to establish that at the time of Mr. Barkes' suicide, Warden Williams and Commissioner Taylor knew that the DOC's suicide prevention policy created a substantial risk that was "longstanding, pervasive, well-documented, or expressly noted by prison officials in the past." *Framer v. Brennan*, 511 U.S. 825, 842 (1994). The events surrounding Mr. Barkes' suicide cannot be evidence of Warden Williams' or Commissioner Taylor's knowledge that the DOC's existing suicide prevention policy created an unreasonable risk of Mr. Barkes' suicide. That Delaware's rate of prison suicides in 2001-2002 was double the national average is information that might have alerted Warden Williams or Commissioner Taylor that suicide protocols were insufficient, but Plaintiffs have not presented any evidence that either Defendant had knowledge of this fact in 2004. The USDOJ 2006 Findings Report, from which Plaintiffs quote extensively, cannot be probative of Commissioner

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[7] More specifically, in the context of prison suicides, the Court has held that a plaintiff must "(1) identify specific training not provided that could reasonably be expected to prevent the suicide that occurred, and (2) must demonstrate that the risk reduction associated with the proposed training is so great and so obvious that the failure of those responsible for the content of the training program to provide it can reasonably be attributed to a deliberate indifference to whether the detainees succeed in taking their lives." *Colburn v. Upper Darby Tp.*, 946 F.2d 1017, 1030 (3d. Cir.1991).

Taylor's or Warden William's awareness *in 2004* of a substantial risk posed by the DOC's suicide prevention protocols. Since Plaintiffs have not presented any evidence that information regarding the effectiveness of the DOC's suicide prevention protocols and training was available and accessible to Commissioner Taylor or Warden Williams in 2004, the Court is unable to find that the risk of Eighth Amendment injury arising from the DOC's suicide prevention protocols was so obvious that these officials must have known. *Beers-Capital v. Whetzel*, 256 F.3d 120, 133 (3d Cir.2001) ("subjective knowledge on the part of the official can be proved by circumstantial evidence to the extent that the excessive risk was so obvious, the official must have known of the risk").

Second, Plaintiffs have not identified specific training and protocols that could have prevented Mr. Barkes' suicide. Plaintiffs criticize the DOC's "mechanical" intake screening and form,[8] and the fact that an LPN, not a RN or a doctor, performed Mr. Barkes' intake. (D.I. 54 at 30-31.) They contend that Mr. Barkes was not adequately supervised, and should have been housed in a cell "free from bed sheets or other implements of suicide." (*Id.* at 34.) However, Plaintiffs do not discuss how different intake screening or different medical personnel would have resulted in Mr. Barkes' identification as suicidal, and prevented his suicide. Plaintiffs also do not identify any training that should have been provided by the State of Delaware for its correctional officers but was not, nor do Plaintiffs depict how additional or different training would have alerted the DOC correctional

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[8] Plaintiffs rely heavily on the USDOJ's 2006 Report, but the Report states that the "the form used to conduct intake assessments is good." (D.I. 55 at B60.)

officers on duty that Mr. Barkes required closer supervision and/or a different cell.

Accordingly, the State Defendants' motion for summary judgment on Plaintiffs' § 1983 claims will be granted.

C. Plaintiffs' State Law Claims

Plaintiffs' complaint also seeks recovery against State Defendants based on Mr. Barkes' wrongful death, under 10 Del. C. § 3724, which states "an action may be maintained against a person whose wrongful act causes the death of another." However, the Delaware State Tort Claims Act "shields a defendant from personal liability for acts done in good faith, without gross or wanton negligence, and arising out and in connection with the performance of official discretionary duties. *See* 10 Del. C. § 4001(3)." *Woulard v. Food Service*, 294 F.Supp.2d 596, *604-605 (D.Del.2003). In *Saunders v. Sullivan*, No. 373, 1991, 1992 WL 53423, at *2 (Del. Feb. 26, 2002) the Delaware Supreme Court held:

> To establish gross negligence a party must demonstrate "more than ordinary inadvertence or inattention." *Jardel Co., Inc. v. Hughes*, Del.Supr., 523 A.2d 518, 530 (1987). Gross negligence is the failure to perceive a risk of such a nature and degree that the failure to perceive such risk constitutes a gross deviation from the standard of care exercised by a reasonable person. *Id.* Wanton behavior, on the other hand, is similar to recklessness; it is a conscious indifference to a substantial risk. *Id.*
>
> The deliberate indifference standard, as applied in the federal suit, requires proof of indifference to

known substantial risks. Delaware mandates this same requirement. *Jardel*, 523 A.2d at 530.

Plaintiffs have not presented any evidence that might allow a trier of fact to infer bad faith on the part of Commissioner Taylor or Warden Williams. Also, because the Court has concluded that Plaintiffs cannot establish deliberate indifference by Commissioner Taylor or Warden Williams, the Court concludes that Plaintiffs cannot establish their "gross or wanton negligence." Accordingly, the Court will grant State Defendants' motion for summary judgment on Plaintiffs' wrongful death claim.

CONCLUSION

For the reasons discussed, State Defendants' Motion For Summary Judgment (D.I. 49) will be granted.

An appropriate Order will be entered.

ORDER

At Wilmington, the 27th day of February 2008, for the reasons set forth in the Memorandum Opinion issued this date;

IT IS HEREBY ORDERED that Defendants Delaware Department of Corrections, Stanley Taylor and Raphael Williams's Motion For Summary Judgment (D.I. 49) is *GRANTED*.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12-3074

KAREN BARKES, as administratrix
of the Estate of Christopher Barkes;
ALEXANDRA BARKES; BRITTANY BARKES

v.

FIRST CORRECTIONAL MEDICAL, INC.;
STANLEY TAYLOR; RAPHAEL WILLIAMS;
CERTAIN UNKNOWN INDIVIDUAL EMPLOYEES
OF THE STATE OF DELAWARE DEPARTMENT
OF CORRECTIONS;
CERTAIN UNKNOWN INDIVIDUAL EMPLOYEES
OF FIRST CORRECTIONAL MEDICAL, INC.
STATE OF DELAWARE DEPARTMENT OF CORRECTIONS

Stanley Taylor and Raphael Williams,
Appellants

(D. DE. No. 1-06-cv-00104)

SUR PETITION FOR REHEARING
WITH SUGGESTION FOR REHEARING EN BANC

Present: McKEE, *Chief Judge*, RENDELL, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, Jr., VANASKIE, SHWARTZ and KRAUSE, *Circuit Judges*.

The petition for rehearing filed by Appellants Stanley Taylor and Raphael Williams in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied. Judges Jordan, Hardiman and Krause voted for rehearing.

BY THE COURT:

s/ D. Michael Fisher
Circuit Judge

Dated: October 3, 2014

tyw/cc: Joseph C. Handlon, Esq.
Jeffrey K. Martin, Esq.